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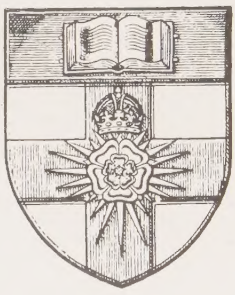

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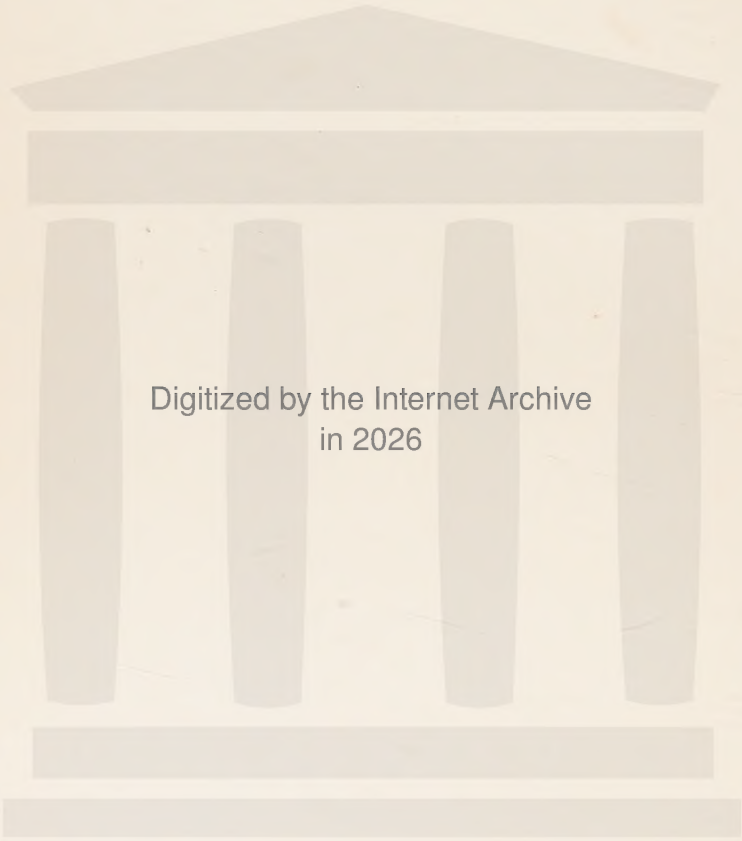
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THE CRIMINAL APPEAL REPORTS

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THE

CRIMINAL APPEAL REPORTS

FEBRUARY 18, 1952 TO DECEMBER 17, 1952

EDITED BY

T. R. FITZWALTER BUTLER,

OF THE INNER TEMPLE AND MIDLAND CIRCUIT, BARRISTER-AT-LAW, RECORDER OF NEWARK

VOLUME 36

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MIDLAND CIRCUIT. DERBYSHIRE WINTER ASSIZES

BEFORE

MR. JUSTICE DEVLIN

Re HAROLD BERESFORD

1952
Feb. 18

Manslaughter—Coroner's Inquest—Lesser Charge Not to be Preferred Before Conclusion of Inquest—Dangerous Driving Resulting in Death—Charge of Manslaughter Generally Appropriate.

Where a coroner has commenced to hold an inquest touching a death, the police should not prefer a charge of an offence less than manslaughter, *e.g.*, a charge of dangerous driving, before the inquest is concluded; and if such a charge has been preferred, it should not be heard and determined until after the conclusion of the inquest.

Where dangerous driving has resulted in death, there is generally a prima facie case of manslaughter, and the police should not, as a general rule, prefer a charge of dangerous driving only in such a case.

Application before Devlin J. at Derbyshire Assizes.

On July 8, 1951, the defendant, Harold Beresford, was the driver of a motor-car which was involved in a collision with a girl pedal cyclist, as a result of which the cyclist lost her life. On the following day the coroner opened an inquest on her death, and, after formal evidence had been heard, adjourned the proceedings till August 7. On August 2, 1951, the defendant appeared at Wragby Magistrates' Court, Lincs., to answer an information for dangerous driving arising out of the same circumstances which had been preferred against him by the police. He elected to be dealt with summarily, pleaded guilty, and was fined £7 10s. and his licence was ordered to be endorsed. On August 7 the inquest was concluded, and the

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coroner's jury, by a majority, returned a verdict of manslaughter against the defendant. The defendant was committed for trial to Lincolnshire Autumn Assizes on that charge on the coroner's inquisition. At the assizes Cassels J. directed that the matter should be referred to the Attorney-General, who subsequently directed that a *nolle prosequi* should be entered.

R. Millner for the Crown.

DEVLIN J.: The entry by the Attorney-General of a *nolle prosequi* in this case concludes the matter so far as any other proceedings are concerned, but the case gives rise to certain questions, upon which I propose to make some observations which I have carefully considered and which I make after consultation with the Lord Chief Justice, and they have his agreement.

It is common-place that in all cases of sudden death the law requires that an inquest should be held and, as a general rule, the inquest should be concluded before any other step is taken. There is one exception to that rule provided by statute and that is when a charge of murder or manslaughter is preferred. In any other case the question of criminal responsibility for the death should be decided at the inquest before any lesser charge arising out of the same circumstances is tried. It is, I believe, a general practice, and it is certainly the proper practice, that the coroner should hold and complete the inquest unless he is informed that a charge of murder or manslaughter has been preferred. Conversely, the police should not prefer any lesser charge, or, if for some reason such a charge is preferred, it should not be heard and determined, until after the inquest is concluded. If this practice is followed, the possibility of two tribunals arriving at incongruous results will be lessened and the anomalous situation which has arisen in this case will not occur again.

There is another matter which calls for comment. It is disturbing to find that the police have been content to prefer

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a charge of dangerous driving in a case in which a coroner's jury arrived at a verdict of manslaughter. I am not, of course, saying that that verdict would necessarily have been reached at the end of the trial, nor am I, of course, criticising the decision of the Attorney-General not to prosecute this case further. The defendant has been convicted and has paid the penalty which the justices thought sufficient. But, speaking generally, when dangerous driving results in death, there is likely to be, at any rate, a prima facie case of manslaughter. The degrees of negligence that are appropriate to the two crimes cannot be precisely defined and this makes the question ordinarily one to be determined by a jury.

The police can never be criticised if the jury thinks it right to reduce the charge, nor even if the judge thinks it proper to withdraw it from the jury, but they can be criticised if they usurp the functions of the proper tribunal by determining in advance what ought to be a triable issue. Similar considerations apply to the two charges of dangerous driving and careless driving. There are, I believe, too many cases where the justices are prevented from dealing with dangerous driving as such because the police have preferred the lesser charge.

As I have said, in the circumstances of this case, the Attorney-General having entered a *nolle prosequi*, the case will not be further proceeded with.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE JONES AND MR. JUSTICE PARKER

1952
Feb. 25

KENNETH ROLFE

Indecent Assault—Indecent Exposure and Movement Towards Woman with Indecent Suggestion—Summing-up—Corroboration—Admission by Prisoner.

The appellant was convicted of indecent assault on a woman. The appellant admitted, in evidence, that he had exposed himself to the woman, and moved towards her with his person exposed and inviting her to have connection with him, but denied that he had actually touched her.

Held, that the acts admitted by the appellant could amount to an indecent assault on the woman, and that, as on such a charge what is required to be corroborated is the indecency, there was no necessity to direct the jury on corroboration, in view of the appellant's own admissions.

Appeal against conviction and sentence.

The appellant was convicted at Buckinghamshire Quarter Sessions on January 2, 1952, of indecent assault on a woman, and was sentenced by the deputy-chairman to four years' corrective training.

The complainant was travelling in a train in a compartment in which she was the only passenger when the appellant joined her. It was common ground between the prosecution and the defence that the appellant exposed himself to the woman, and with his person exposed, moved towards her, inviting her to have connection with him. The woman stated that the appellant put his hand on her shoulder, but this the appellant denied. The deputy-chairman, after he had concluded his summing-up, on the suggestion of counsel for the prosecution, merely told the jury with regard to corroboration that it was essential that they should find some corroboration in the case.

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W. Rawlinson for the appellant:

The charge being one of indecent assault, corroboration of the complainant was required as a rule of practice. The direction of the deputy-chairman on this matter was wholly inadequate. He referred to it only in a short passage after he had concluded his summing-up following on a reminder from counsel for the prosecution that he had not dealt with this question. He never explained to the jury what was meant by corroboration, or what evidence in the case they were entitled to rely on as corroborative of the complainant. Further, he did not explain to the jury the difference between indecent assault and indecent exposure, nor did he tell them that any admission made by the appellant was an admission of indecent exposure only.

J. Malcolm Milne, for the Crown, was not called on.

THE LORD CHIEF JUSTICE: The appellant was convicted at Buckinghamshire Quarter Sessions of indecent assault and sentenced to four years' corrective training. He appeals to this court by leave of the single judge on the ground that the court should consider the summing-up with regard to corroboration.

Mr. Rawlinson has put with vigour and propriety every point which could be put on behalf of the appellant, but in the opinion of the court there is nothing in the summing-up which requires any further consideration and the case is as clear as it could be. The case for the prosecution was that the complainant was a passenger in a stopping train from Watford and the appellant got into the compartment where she was sitting alone. While the train was in motion the appellant undid his trousers and, with his person exposed, came towards her and made an indecent suggestion to her. That the appellant admitted. The only thing that can be said to have been in any way in issue between them is that the young woman said that he touched her with his hand on her shoulder, and he denied that.

The first thing to observe is this: one can very seldom take some rule which has been laid down in another case and apply

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it to the case under consideration, irrespective of the facts of that particular case. Secondly, the offence of assault is often confused with the offence of battery. An assault can be committed without touching a person. One always thinks of an assault as the giving of a blow to somebody, but that is not necessary. An assault may be constituted by a threat or a hostile act committed towards a person, and if a man indecently exposes himself and walks towards a woman with his person exposed and makes an indecent suggestion to her that, in the opinion of this court, can amount to an assault.

How could there be any necessity for corroboration here? Where corroboration is necessary on a charge of indecent assault, it is necessary to corroborate the indecency. The appellant has always admitted that he behaved in an indecent fashion towards the girl, that he exposed himself to her, that he invited her to have connection with him, and that he walked towards her with that object. No further corroboration was wanted. This is not a case where a girl says that a man indecently assaulted her, and one wants to find out whether she was a consenting party, in order to arrive at a conclusion whether there was an indecent assault. What is required to be corroborated in cases of indecent assault is the indecency. Here the appellant admits it.

There is no fault to be found with the conviction; if there was, we should certainly apply the proviso. The learned deputy-chairman did not deal with the question of corroboration in quite a perfect way. He could quite well have told the jury that there was no need to trouble about corroboration in view of the appellant's own evidence.

[The learned Lord Chief Justice went on to say that, in the opinion of the court, there was no ground for interfering with the sentence.]

The appeal is dismissed.

Appeal dismissed.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE ORMEROD AND MR. JUSTICE PARKER

ARNOLD BEXON

1952
Mar. 6

Sentence—Mental Defective—Lack of Institutional Accommodation —Mental Deficiency Act, 1913 (3 & 4 *Geo.* 5, *c.* 28), *s.* 8 (1) (*a*).

Order under section 8 (1) (*a*) of the Mental Deficiency Act, 1913, directing that a petition be presented to a judicial authority and that meanwhile the defective remain in prison as a place of safe custody, quashed, on the ground that the defective had already spent a considerable time in prison and there was no prospect of institutional accommodation being available for him in the near future.

Appeal against sentence.

On April 20, 1951, the appellant, a youth of 17, was convicted by Nottingham City magistrates of two offences of larceny and was placed on probation for three years, with a condition of residence for one year in a hostel. He absconded from the hostel and on July 1, 1951, appeared before the same court in respect of the breach of the probation order. He was then committed, under section 20 (3) of the Criminal Justice Act, 1948, for sentence to Nottingham City Quarter Sessions. On September 25, 1951, the recorder made a probation order in similar terms to those of the first order. The appellant again absconded, and on October 20, 1951, was brought before a metropolitan magistrate, who committed him in custody under section 6 (1) of the Act of 1948, to Nottingham City Quarter Sessions to be dealt with for the breach. On January 2, 1952, the recorder, having received evidence from the medical officer of Lincoln Prison that the appellant was a mental defective, made an order under section 8 (1) (*a*) of the Mental Deficiency

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Act, 1913, directing that a petition be presented to a judicial authority and that meanwhile the appellant be kept in Lincoln Prison as a place of safe custody, under subsection (3).

R. M. O. Havers for the appellant.
T. R. Fitzwalter Butler for the Crown.

The Lord Chief Justice informed counsel that the court had received a letter from the Nottingham City Council that no petition had yet been presented, and both counsel agreed that a long time was likely to elapse before accommodation in an institution became available for the appellant.

THE LORD CHIEF JUSTICE: This is a very unfortunate and unsatisfactory case and I desire to say at once that, in taking the course which we are taking, we are not in any way reflecting on the course which the learned recorder took, who was faced with an extraordinarily difficult problem and only wanted to do the best he could for this youth whom he was satisfied, I think on good grounds, was mentally deficient, though not certifiable as an insane person.

The appellant was convicted of two offences of larceny on April 20, 1951, and the Nottingham City justices before whom he was convicted made a probation order for three years with a condition of residence for 12 months at a specified hostel. On July 1, 1951, having absconded from the hostel, he appeared before the same court in respect of a breach of the probation order—namely, absconding from the hostel—and was committed to quarter sessions, under section 20 (3) of the Criminal Justice Act, 1948, for sentence with a view to his being sent to Borstal. I just pause to say that any person who is put on probation with a condition as to residence must understand, or ought to understand, if he is capable of understanding, that these conditions are meant to be observed and that to break them is a serious matter, because if they are broken the offender is liable to be taken back and punished for the offence for which he was put on probation. When the appellant was committed

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with a view to being sent to Borstal, he had to remain in custody till the next quarter sessions, which were not till September 25. On September 25 the Recorder of Nottingham made a new probation order in similar terms to the previous one, that is, for three years with a condition of residence. The appellant was sent to a hostel in London, because he is afflicted with a bad impediment in his speech and it was thought that while he was there he could be given special treatment to make him speak better than he does. He absconded from there, but was arrested and on October 20 taken before a metropolitan magistrate, who sent him back to the Recorder of Nottingham to be dealt with again for a further breach. He was brought before the recorder on December 19, and at an adjourned hearing on January 2, 1952, the recorder received evidence from the medical officer of Lincoln Prison which satisfied him that the appellant was mentally deficient, but not certifiable as an insane person. The recorder, being perplexed as to what to do, took a course which it was quite open to him to take, and directed that a petition should be preferred under section 8 (1) (*a*) of the Mental Deficiency Act, 1913, with a view to having the appellant taken into a home for mental defectives where he could be kept, and ordered that he be kept in Lincoln Prison as a place of safe custody meanwhile. Unfortunately, though Parliament has provided that this course can be taken, enough homes have not been provided for the number of people who are waiting to go to them, and in this particular case no one can find a place to which to send this youth. What is the court to do? Except for the short periods when he was at the hostel from which he absconded, he has now been in custody for nearly a year, and the court cannot remand him in custody for an indefinite period in the hope that perhaps this time next year room may be found for him in a home for mental defectives. Therefore the only thing this court feels it can do, especially considering the length of time during which the appellant has been in custody, which is sufficient punishment

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for his original offence, is to order his discharge tomorrow. We pass such a sentence on him for his breach of probation as will entitle him to be discharged tomorrow morning.

Sentence varied.

Solicitor: D. E. Morgan, Nottingham, for the Crown.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE ORMEROD AND MR. JUSTICE PARKER

1952
Mar. 17

JAMES LEONARD FREDERICK MORAN

Verdict—Demanding Money with Menaces—Direction that Jury Could Convict of Attempt—Conviction of Attempted Robbery—Criminal Appeal Act, 1907 (7 *Edw.* 7, *c.* 23), *s.* 5 (2)—*Larceny Act*, 1916 (6 *&* 7 *Geo.* 5, *c.* 50), *s.* 30.

There is no such offence in law as that of attempting to demand money with menaces. Where, therefore, on a charge of demanding money with menaces the judge directed the jury that it was open to them, if they thought proper, to convict of the attempt, and the jury convicted of attempted robbery.

Held, that, though in view of the direction, the verdict should be treated as one of attempting to demand money with menaces, the verdict was one not possible in law; and that, as in view of the direction and verdict, the court could exercise its power under section 5 (2) of the Criminal Appeal Act, 1907, of substituting a verdict of guilty of another offence, the conviction must be quashed.

Appeal against conviction.

The appellant was convicted at Suffolk Assizes on January 30, 1952, of attempted robbery, and was sentenced by Croom-Johnson J. to six months' imprisonment.

The appellant was indicted for demanding money with menaces from one Fairweather. It was proved that he met

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JAMES LEONARD FREDERICK MORAN

Goddard L.C.J., Ormerod J., Parker J.

Fairweather in a street at night and offered to direct him on his way, and then said to him: "I want some money, and, if not, you've had it"; but that, when Fairweather squared up to him, the appellant ran away and made no attempt to follow him. The judge directed the jury that on the evidence it would be possible for them, if they thought proper, to convict the prisoner of an attempt to demand money with menaces. The jury convicted the appellant of attempted robbery.

R. M. O. Havers for the appellant:

The jury returned a verdict which it was not open to them to return on the indictment and which cannot stand. Further, inasmuch as the essence of the offence charged is the demand and not the obtaining, there cannot be an attempt to demand, and the jury should not have been directed that this was a possible verdict. The only conceivable possibility of such an attempt would be in the case of a man who stuttered.

Lionel Jellinek for the Crown.

It is conceded that the verdict cannot stand, but as on the evidence it was open to the jury to convict of demanding with menaces, the court is invited to exercise its powers under section 5 (2) of the Criminal Appeal Act, 1907, and substitute a verdict of guilty of that offence.

THE LORD CHIEF JUSTICE: The appellant was convicted before Croom-Johnson J. at Suffolk Assizes, where he was tried on an indictment for demanding money with menaces, contrary to section 30 of the Larceny Act, 1916.

The case was not a serious case of its kind. Apparently knowing that a Mr. Fairweather had some money in his pocket and was walking up the village street to the village inn after dark, the appellant went up to him and offered to show him the way somewhere because he thought Mr. Fairweather had lost his way. Then he got off his bicycle and said: "I want some money and if not, you have had it." Then, apparently,

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Mr. Fairweather squared up to the appellant and the appellant went away and made no attempt to follow him.

The learned judge, evidently taking the view that, unlike most cases of this kind, this was not a very serious case, directed the jury: "But there is one other thing which you are entitled to bear in mind if you so choose. No money was in fact obtained"—that in itself is immaterial, because the offence consists, not in obtaining money, but in demanding money. "The crime is constituted by the demand for the money with menaces and without any reasonable cause, and all the rest of it, as I have indicated to you already. You may think that, so far as the prisoner was concerned, the prisoner did not quite get resolution up to the sticking point and you may think that there is a possibility that he went a certain way, having determined that he was going to get the money out of Mr. Fairweather if he could, but that then his resolution forsook him and he mounted on his bicycle and went away. If you think that is the real explanation of this case, it is possible for you, if you think proper—if you think that justice would be served thereby—to find the prisoner guilty of the attempt on count No. 1; and, if you find him guilty of the attempt on count No. 1 and not of the offence, all you can do about count 2 is to say 'not guilty'." That count charged him with being in possession of a firearm. The jury found him not guilty on that count, and on the first count guilty of attempting to rob.

In the opinion of the court, there cannot be a verdict of attempting to demand money with menaces. A man may form the intention of demanding money with menaces and then not put his intention into practice. In that case he would not be guilty of demanding. But the court cannot see how a person can be guilty of an attempt to demand; there is either a demand or there is not. As the charge was not a charge of robbery, but a charge of demanding money with menaces, we must, in view of the direction of the learned judge, take it that the verdict of the jury amounted to an attempt to demand money with

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menaces. We think there was a misdirection on that point, and a substantial misdirection. We think the learned judge probably had robbery in his mind, but we do not see how we can support a conviction for attempting to demand money with menaces, and consequently the conviction is quashed.

I should say that the prosecution have asked us to exercise our powers under section 5 (2) of the Criminal Appeal Act, 1907, to substitute another verdict. We do not think we can do so in view of the direction and the verdict. Sometimes, where a man has been charged with and convicted of larceny, and it is proved that the offence amounted to false pretences because of the intention by the prosecutor to part with the property, the court can exercise its discretion and say: "There is an offence here, but the offence is not larceny; it is false pretences," or vice versa. We do not think we can do that in a case of this sort, because the jury found their verdict after a direction which invited them to do so.

Conviction quashed.

Solicitors: Gotelee & Goldsmith, Ipswich, for the Crown.

STATEMENT ON AWARDING COSTS TO PERSONS ACQUITTED

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE ORMEROD AND MR. JUSTICE PARKER

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The following statement was made by THE LORD CHIEF JUSTICE:—

The court desires to take this opportunity to correct some misapprehension which appears to have arisen about the exercise of the power conferred by section 44 of the Criminal Justice Act, 1948, to award the payment of costs out of local funds to a person who has been acquitted on his trial. The

misunderstanding may have arisen out of a circular sent, after consultation with the judges of this division, to chairmen of quarter sessions and recorders in November, 1948, and we think that this circular may have been construed in a more rigid manner than was intended.

In the circular of 1948 the judges approved a circular that had been sent out by the Home Office to the effect that costs under section 44 should be awarded only in exceptional circumstances. Some instances of exceptional circumstances were given, but they were intended only as examples and not as a comprehensive list.

Let me reiterate the principle that the judges think should be followed in this matter. While section 44 in terms imposes no limit on the discretion of the court, it was never intended, and it would be quite wrong, that costs should be awarded as of course to every defendant who is acquitted. Its use should be reserved for exceptional cases, and every case should be considered by the court on its own merits.

I may add that a reference to *Hansard* shows that this is in accordance with what the Attorney-General stated in Parliament was the intention of the clause when it was being considered in Committee.

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ALFRED SUMMERS

Summing-up—Use of Phrase "Reasonable Doubt."

It is better that a summing-up should avoid the use of the phrase "reasonable doubt" and should direct the jury that it is their duty to see that the evidence satisfies them so that they can feel sure when they return a verdict of Guilty, and that otherwise they must not convict.

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ALFRED SUMMERS

Goddard L.C.J., Ormerod J., Parker J.

Appeal against conviction and sentence.

The appellant was convicted at Surrey Quarter Sessions on January 24, 1952, of larceny of lead and was sentenced by the Chairman to five years' imprisonment.

J. M. Buckland, for the appellant.

Sir John Cameron, for the Crown.

THE LORD CHIEF JUSTICE [after referring to the facts and the use of the phrase " reasonable doubt " in the summing-up] : I have never yet heard a court give a satisfactory definition of what is a reasonable doubt, and it would be very much better if summings-up did not use that expression, for it seems to me that, whenever a court attempts to explain what is meant by a reasonable doubt, it gives a definition or tries to explain the term in a way which is often likely to cause more confusion than clarity. It is far better, instead of using the words " reasonable doubt " and then trying to explain what is a reasonable doubt, to direct a jury : " You must not convict unless you are satisfied by the evidence that the offence has been committed." The jury should be told that it is not for the prisoner to prove his innocence, but for the prosecution to prove his guilt. If a jury is told that it is their duty to regard the evidence and see that it satisfies them so that they can feel sure when they return a verdict of Guilty, that is much better than using the expression " reasonable doubt " and I hope in future that that will be done. I never use the expression when summing-up. I always tell a jury that, before they convict, they must feel sure and must be satisfied that the prosecution have established the guilt of the prisoner.

[His Lordship went on to say that there were no grounds for interfering with either conviction or sentence, and that the appeal must be dismissed.]

Appeal dismissed.

Solicitor : Solicitor for Metropolitan Police, for the Crown.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE ORMEROD AND MR. JUSTICE PARKER

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JOHN OWEN

Jury—Retirement on Conclusion of Summing-up—Request for Further Evidence—Witness Recalled by Judge—Conviction Quashed.

After the conclusion of the summing-up, if the jury, either before or after retirement, ask the judge a question on any matter on which evidence has been given, it is proper for the judge to remind the jury of such evidence and to instruct them accordingly, but it should be regarded as an established rule that, once the summing-up is concluded, no further evidence ought to be introduced to the jury.

BROWNE (1943) 29 Cr.App.R. 106, referred to.

Appeal against conviction (on certificate).

The appellant was convicted at Cheshire Assizes on February 18, 1952, of carnal knowledge of a girl under 16 and was sentenced by Oliver J. to nine months' imprisonment.

On the conclusion of the summing-up, the jury retired to consider their verdict. Some time later, they sent a message to the judge saying that they desired evidence on the question whether a clinic, where the offences were alleged to have been committed, would be empty or occupied at the material times. The judge recalled a doctor, who had already given evidence, but only on the physical condition of the girl concerned. He stated that at the times when the offences were committed no one would be at the clinic, unless exceptionally. The jury retired again for a very short time, and then brought in a verdict of Guilty. The judge granted a certificate for appeal, under section 3 (*b*) of the Criminal Appeal Act, 1907, on the question whether he was right in allowing the witness to be recalled after the summing-up and after the jury were enclosed.

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J. Jones Roberts, for the appellant:

There is a distinction between the calling of evidence before the retirement of the jury and after it. The authorities lay down certain principles on which evidence can be called in rebuttal, after the close of the case for the defence. [He referred to FROST (1839) 9 C. & P. 129, at p. 159; 4 St.Tr. (N.S.) 85, at p. 386; DORA HARRIS (1927) 20 Cr.App.R. 86; [1927] 2 K.B. 587, and LIDDLE (1929) 21 Cr.App.R. 3.] All these cases, however, relate to evidence called in rebuttal before the commencement of the summing-up. The only case where evidence has been called after the conclusion of the summing-up appears to be BROWNE (1943) 29 Cr.App.R. 106, and in that case it was regarded by the Court of Criminal Appeal as an irregularity. It is clear that the recalling of the doctor in this case must have influenced the verdict of the jury.

Bertrand Richards, for the Crown:

It is conceded that the calling of evidence after the retirement of the jury is, generally speaking, undesirable, but in the present case the judge evidently regarded that it would be in the interests of justice to allow the evidence to be called, and it is submitted that in this particular case the judge exercised his discretion properly. The facts of this case were quite different from those in BROWNE (*supra*) and it is submitted that there is no fixed rule on the matter.

At the conclusion of the arguments the Chief Justice stated that the appeal would be allowed and the conviction quashed, and that the court would give their reasons for their decision at a later date.

Cur. adv. vult.

Apr. 7.—The judgment of the court was read by:—

THE LORD CHIEF JUSTICE: We have already allowed this appeal and quashed the conviction and now proceed to give our reasons.

The appellant was charged at the last assizes for Cheshire before Oliver J. with carnal knowledge of a girl under the age

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of 16 and was convicted and sentenced to nine months' imprisonment. The learned judge granted a certificate to enable him to appeal, the point of law that arises being whether he was right in allowing a witness to be recalled after the summing-up and after the jury were enclosed to answer a question which the jury put to the learned judge. Although the notice of appeal raises certain other matters, the court is quite satisfied that there was nothing in them which would justify the court interfering with the conviction, and the only question which falls for decision is that for which the certificate was granted.

The facts of the case were that the appellant, a man of some 70 years of age, was a caretaker or porter at a clinic at Blaenau-Festiniog and it was alleged that on the days mentioned in the indictment, that is to say, on three occasions, he took the girl, whose age is 14, to the clinic and in a room there, which seems to have been the X-ray room, he committed the offences charged. These visits to the clinic all took place in the afternoon when the girl was coming home from school at about 3.30 or 4 o'clock.

The police inspector who gave evidence was cross-examined by counsel for the defence and, among other questions, these were put to him: "(Q.) So this clinic would be visible to 20 or 30 houses placed on Wynnes Road? (A.) Yes. (Q.) It is a public place, in other words? (A.) Yes. (Q.) Indeed, a much frequented place? (A.) Undoubtedly. (Q.) Doctors go there to attend to their patients, and there are often 10 to 40 patients awaiting examination at the same time? (A.) I cannot say the numbers. [Oliver J.: Do you know what the clinic hours were?] (A.) No." Further cross-examined, he was asked: "Do you know that doctors do their work in the clinic, and it is a common sight to see people waiting about for their turn to go into the clinic? (A.) Yes." On re-examination he was asked: "Do you know whether or not the public go into this dark room? (A.) Not to my knowledge."

When the case for the prosecution was closed the appellant

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gave evidence, his evidence being a complete denial of the charges, and the learned judge summed up. After the jury had retired for some time, they sent a message to the learned judge saying that they wanted evidence whether this clinic would be empty or occupied at the material times. The learned judge was of opinion that the question was, as he described it, of vital relevance and could have been proved by the prosecution as part of their case, and, as he has stated in his certificate, "Being of opinion that the interests of justice demanded the evidence, and that the defendant would not be unjustly prejudiced if I allowed the evidence, I did so." The doctor who had previously given evidence in the case, but merely as to the girl's physical condition, was then recalled, and the effect of his evidence was that at the times when the offences were alleged to have been committed no one, neither doctors nor patients, would be at the clinic unless exceptionally. That evidence having been given, the jury, after a very short retirement, returned a verdict of Guilty.

The question how far evidence may be called by the prosecution after the case has been closed has been discussed in many cases, but in only one in such circumstances as these. It is quite clear that a judge may in his discretion allow evidence to be called in rebuttal of some case set up for the first time by the defence. The case usually cited as authority on this point is FROST (1839) 9 C. & P. 129, at p. 159; 4 St.Tr. (N.S.) 85, at p. 386, where Tindal C.J. said: "There can be no doubt about the general rule, that where the Crown begins a case (as it is with an ordinary plaintiff), they bring forward their evidence, and cannot afterwards support their case by calling fresh witnesses, because there may be evidence in the defence to contradict it. But if any matter arises *ex improviso*, which the Crown could not foresee, supposing it to be entirely new matter, which they may be able to answer only by contradictory evidence, they may give evidence in reply." This, it will be observed, is dealing only with the right of the Crown to call evidence in rebuttal and does not deal with whether

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evidence can be given after the summing-up. We may observe that the rule laid down by Tindal C.J. is probably in wider language than would be applied at the present day. Indeed, in CRIPPEN, 5 Cr.App.R. 255, at p. 266; [1911] 1 K.B. 149, at p. 157, the court said in terms that they did not propose to adopt the language of that learned judge and that they considered that the rule laid down in those terms might in some cases place an unfair burden on counsel for the prosecution and that it was a question for the judge at the trial to determine in his discretion whether the evidence, not having been tendered in-chief, ought to be given as rebutting evidence. In DORA HARRIS, 20 Cr.App.R. 86; [1927] 2 K.B. 587, the court seems to have reconsidered with approval the words we have just cited from FROST (*supra*), but this was a case in which the learned recorder himself called a witness towards the end of the case and examined him himself. In SULLIVAN, 16 Cr.App.R. 131; [1923] 1 K.B. 47, rebutting evidence was called before the summing-up and after the speech of counsel for the defence, apparently to rebut a suggestion in his speech that a particular person had committed the offence with which the prisoner was charged, and it was held that the judge had a discretionary power to act as he did and that this court would not interfere unless they were of opinion that an injustice had been caused, whereas in LIDDLE (1929) 21 Cr.App.R. 3, the deputy chairman of sessions adjourned a case for three days to enable evidence to be called to rebut the defence of *alibi* and it was held that the conviction must be quashed as this was an irregularity, the court considering that the nature of the defence was one of so common a kind that it must always be anticipated and that it was not proper to take the course there adopted merely for the purpose of rebutting the defence of *alibi*.

None of these cases—and there are more to the like effect—are really in point in determining the question which falls for decision in this case, and the only case of which we are aware in which the point has actually arisen is that of BROWNE (1943) 29 Cr.App.R. 106. There, after the summing-up and

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the enclosure of the jury, the latter asked the chairman to allow some evidence to be given with regard to the prisoner's state of mind and, after some pressure, the chairman allowed the prison doctor to be called, who gave evidence on this matter. It is true that in that case there were other grounds for quashing the conviction, but the court, consisting of Lord Caldecote C.J., Asquith and Cassels JJ., were of opinion that this was an irregularity and was a reason for quashing. In the judgment of the court it is stated (at p. 112): "A jury is sworn to give a verdict according to the evidence. It is not sworn to give a verdict according to any suggestions or propositions which may have been followed up in the course of the trial."

Now we do not desire in any way to limit the discretion of a judge to admit evidence for the prosecution after the case for the defence has been closed where it becomes necessary to rebut matters which have been raised for the first time by the defence. It is much more likely that this may be necessary nowadays since prisoners are entitled to give evidence on their own behalf whereas in the days of Tindal C.J. such evidence could not be given, and, as we have already pointed out, this court in CRIPPEN (*supra*) declined to adopt the rule that he laid down in all its strictness. It must be a matter for the discretion of the judge, which should be applied with caution, but it appears to us that it is quite another thing to say that, after the whole case is concluded and it remains only for the jury to return their verdict, it is right to allow further evidence to be given to clear up some matter which is troubling the jury. In fact, the evidence which was admitted was not evidence by way of rebuttal of any matter set up by the prisoner. If it contradicted any evidence, it was that of the police inspector, who was a witness for the prosecution.

It is by no means uncommon for a jury to put a question to the presiding judge after he has concluded his summing-up whether before or after they have retired, and the usual practice is for the judge to tell the jury, if it is the fact, that

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no evidence on the point has been given and they must take it, therefore, that there is no evidence upon it, though, of course, if they ask a question upon which evidence has been given it is quite right for the judge to remind the jury of the evidence. We think this is the only safe practice and it ought to be followed. The theory of our law is that he who affirms must prove and therefore it is for the prosecutor to prove his case, and if there is some matter which the prosecution might have proved but has not, it is too late, after the summing-up, to allow further evidence to be given, and that whether it might have been given by one of the witnesses already called or whether it would necessitate, as in BROWNE'S CASE (*supra*), the calling of a fresh witness. If this were allowed, it is difficult to see what limitation could be put upon it. A witness might be called who would then be open to cross-examination and the defence might then apply to call further evidence in answer. In this case it is quite true that the question asked by the jury was most pertinent, and it is not an unfair assumption to make that their verdict depended upon the answer which the doctor gave. If he had said other people were likely to be at the clinic at the time, it is a reasonable assumption that the jury would have said Not Guilty. As his evidence was that there were no people about at the time, it is quite easy to see that the jury thought this was a vital point, and almost immediately after the evidence had been given they returned a verdict of Guilty. We think they ought to have been told that the prosecution had laid before them such evidence as they had thought fit and the evidence could not now be reopened. It is only fair to the learned judge to say that he himself felt considerable doubt as to whether it was right to recall the witness. He, of course, did not have the advantage on circuit of seeing the Criminal Appeal Reports and, had he been able to refer to the case of BROWNE (*supra*) he probably would not have admitted the evidence. In any case, we think it right to lay down that once the summing-up is concluded, no further evidence ought to be given. The jury can be instructed

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in reply to any question they may put on any matter on which evidence has been given but no further evidence should be allowed.

There were, in the indictment, counts relating to similar offences upon two other girls. Application was made to the learned judge to direct separate trials, to which he did not at first assent, but in the course of the case he thought in fairness to the prisoner it would be desirable that the cases should be dealt with separately. He accordingly stopped evidence with regard to counts 7 and 8 and directed the jury to confine themselves only to the charges in respect of one of the girls, and it was in respect of the counts relating to that girl that the verdict was returned. The other counts remain on the file. In all the circumstances the court directs that they should be proceeded with at the next assizes for Merioneth, where the offence was alleged to have been committed.

Conviction quashed.

Solicitors: Hatchett Jones & Co., agents for Edward Jones & Co., Blaenau-Festiniog, for the Crown.

[DIVISIONAL COURT CASE]

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE ORMEROD AND MR. JUSTICE PARKER

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Quarter Sessions—Committal for Sentence—Procedure—Prisoner Informed by Magistrates of Right to Trial by Jury—Prisoner Not Informed of Liability to be Committed for Sentence—Certiorari—Convictions Quashed—Criminal Justice Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 86), *s.* 24, *as amended by Criminal Justice Act*, 1948 (11 *&* 12 *Geo.* 6, *c.* 58), *s.* 79, *Sched. IX.*

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The applicant appeared before magistrates on charges of false pretences and larceny. He was told by the clerk to the magistrates of his right to trial by jury, and consented to be dealt with summarily, but he was not told, as section 24 of the Criminal Justice Act, 1925, as amended by section 79 of, and Sched. IX to, the Criminal Justice Act, 1948, requires that he should be told, of his liability to be committed for sentence to quarter sessions under section 29 of the Act of 1948, if the magistrates, after conviction, on obtaining information as to his character and antecedents, should be of opinion that their powers of punishment were inadequate. The magistrates dealt with the charges summarily and convicted on both. On obtaining information as to the applicant's character and antecedents, they committed him to quarter sessions for sentence, but quarter sessions, on being informed that the applicant intended to apply for leave to move for an order of certiorari to quash the convictions on the ground of irregularity of procedure, postponed sentence.

Held, that as the amended procedure laid down by Sched. IX to the Act of 1948 with regard to informing the applicant of his liability to be committed for sentence to quarter sessions had not been strictly followed, the convictions and committal were bad, and certiorari must issue to quash the convictions.

COCKSHOTT [1898] 1 Q.B. 582, applied.

Application for order of certiorari.

The applicant, Peter Laurence Machin, appeared before a court of summary jurisdiction for the St. Augustine's Division of Kent on charges of false pretences and larceny. He was told by the clerk to the magistrates of his right to trial by jury, and consented to be dealt with summarily. He was not, however, told of his liability to be committed to quarter sessions for sentence under section 29 of the Criminal Justice Act, 1948. Section 24 of the Criminal Justice Act, 1925, as amended by section 79 and Schedule IX to the Criminal Justice Act provides: " . . . where the defendant may, if convicted by the court, be committed to quarter sessions under section 29 of the Criminal Justice Act, 1948, if the court, on obtaining information as to his character and antecedents, is of opinion that they are such that greater punishment should be inflicted than the court has power to inflict, the court shall explain to him that he may be so committed." The magistrates convicted

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on both charges and then heard evidence of the applicant's character and antecedents. The applicant stated that he desired four outstanding offences to be taken into consideration. The magistrates committed the applicant to East Kent quarter sessions for sentence. The applicant applied for leave to apply for an order of certiorari to quash the convictions on the ground of irregularity in procedure, and quarter sessions, on being informed of this, postponed sentence.

K. G. Jupp, for the applicant.
T. K. Edie, for the respondent justices.

THE LORD CHIEF JUSTICE: In this case Mr. Jupp moves for an order of certiorari to bring up and quash two convictions which took place before the justices of Kent sitting in the St. Augustine's Division, when they convicted the applicant, Peter Laurence Machin, of obtaining credit by fraud on August 21 and 24, and of the larceny of two fountain pens. Obviously, the serious case was the first one. The justices, having convicted the applicant, committed him for sentence to quarter sessions, purporting to act under section 29 of the Criminal Justice Act, 1948. When the applicant appeared before quarter sessions, objection was taken that the conviction was bad and quarter sessions held their hand to enable the matter to be argued in this court on an application for an order of certiorari.

The point is in fact a very simple one, but an unfortunate situation has arisen. Section 29 of the Criminal Justice Act, 1948, gave justices a new power and set up a new procedure. To avoid the difficulty that had been created by the two cases, to which I have made reference in other cases, of SHERIDAN (26 Cr.App.R. 1; [1937] 1 K.B. 223), and GRANT ((1937) 26 Cr.App.R. 8), courts of summary jurisdiction now have a new power when trying an indictable offence summarily. If they hear, after conviction, that a prisoner's character and antecedents are such that they consider their powers of sentence, which are limited to six months for any particular offence and

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to 12 months however many offences there may be, are not enough, they can commit him to quarter sessions for sentence, and quarter sessions can give the same sentence as if the prisoner had been convicted on indictment. That is no doubt a very useful power, but a provision has been inserted in a schedule—and there are in all nine schedules—to the Criminal Justice Act, 1948, which adds a requirement to the many existing requirements which are contained in the Summary Jurisdiction Act, 1879, and the Criminal Justice Act, 1925, and unfortunately this provision, hidden away as it is, was overlooked.

It is well known that when a man is brought before a court charged with an indictable offence which can, with his consent, be treated summarily, certain information has to be given to him by the clerk of the court. He has to be told of his right to be tried by a jury. He has to be asked if he desires to be tried by a jury or whether he desires the case to be dealt with summarily; and when he is given that chance, unless he is an old offender who knows the curious verdicts which juries at quarter sessions sometimes return, he invariably asks to be dealt with summarily, because he knows he cannot get more than six months. The statutory provisions are peremptory. They say what is to be done before the magistrates try an indictable case, because, for many centuries in English history, an indictable case could be dealt with only by a jury, and the practice of magistrates dealing with theft and false pretences is purely the creation of statute which hardly existed, if at all, except in the case of children, before 1879.

In 1898 there was a case called COCKSHOTT [1898] 1 Q.B. 582. That was a case in which the prisoner had been charged under section 17 of the Summary Jurisdiction Act, 1879, and that is an Act which deals with cases which prima facie must be dealt with summarily. The Act provides that in cases where a man is liable to be sent to prison for more than three months he must be told that he can go for trial if he likes; and he has to be told that before the case starts and before he is called

upon to plead. COCKSHOTT'S CASE (*supra*) shows how strictly the court has construed these provisions, because there it was quite obvious that the solicitor for the prosecution and the solicitor for the defence were both present in court before the justices. They had a colloquy, from which it was quite obvious that the prosecuting solicitor was saying: "If you want the case dealt with here, we are quite willing it should be dealt with here." Thereupon no one thought it necessary to tell the man of his right to be tried by a jury because he was represented by a solicitor, and it was obvious, after a conference between the solicitor for the prosecution and the solicitor for the defence, that the parties were going to treat the case as a summary case. The court held that that was not sufficient, and that the provisions of the statute must be strictly complied with and, as the prisoner himself had not been told of his right to be tried by a jury before the trial started, the conviction must be quashed.

The relevant section before 1948 was section 24 of the Criminal Justice Act, 1925. In that section it is provided that if the court is dealing with a case which is prima facie indictable but which, by reason of the provisions of the Schedule to the Act, can be dealt with summarily, then when the court decides to deal with it summarily it will have to reduce the charge into writing, read it to the accused and then ask him: "'Do you desire to be tried by a jury, or do you consent to the case being dealt with summarily?' with a statement, if the court thinks such a statement desirable for his information, of the meaning of the case being dealt with summarily, and of the assizes or quarter sessions, as the case may be, at which he will be tried, if tried by a jury." That was done in this case. The offences with which the applicant was charged were offences with which the magistrates could deal with the consent of the prisoner. There is no question but that he consented. There is no question of any advantage being taken of him because he was represented by a solicitor. The solicitor got up and said: "Yes, my client wishes you to deal with him," and

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he did not desire to give any explanation. Thereupon, the justices were told his character and antecedents, and were also told that he wanted four other cases taken into consideration, and so they committed him to quarter sessions for sentence.

Now, as I say, inserted in a Schedule to the Criminal Justice Act, 1948,—it seems to me most unfortunate that it is put into a schedule and not put into section 29, the section which gives power to commit for sentence—is a provision that the words to be added are, " and where the defendant may, if convicted by the court, be committed to quarter sessions under section 29 of the Criminal Justice Act, 1948, if the court, on obtaining information as to his character and antecedents, is of opinion that they are such that greater punishment should be inflicted than the court has power to inflict the court shall explain to him that he may be so committed." That was overlooked and it was not explained to the applicant that he might be so committed.

Following the reasoning of the court in COCKSHOTT'S CASE (*supra*) we feel we must give effect to it and we must therefore hold that certiorari must go and these convictions must be quashed. The convictions must be quashed because the magistrates took upon themselves, although with the consent of the applicant, to try cases summarily without a strict compliance with the provisions of the Act, which alone allow an indictable offence to be dealt with summarily. It was a very venial mistake in the magistrates and one can well understand their overlooking this provision hidden away in the Schedule; but the applicant is entitled to take advantage of it and therefore the conviction and the committal were bad. That distinguishes this case from NORFOLK JUSTICES, *Ex p.* DIRECTOR OF PUBLIC PROSECUTIONS (34 Cr.App.R. 120; [1950] 2 K.B. 558), because there there had been a strict compliance with the section. No one suggested that the section had not been complied with in the sense of machinery. The only difficulty in that case was that, although the justices had power to convict, they had not the power to commit for sentence for

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reasons into which I need not go now, and therefore the committal was bad and the case was sent back to the justices to complete the hearing.

In this case we hold that the convictions were bad and therefore the case could not be committed for sentence to quarter sessions because the magistrates never obtained jurisdiction to try it, because the statutory provisions had not strictly been complied with. It follows, therefore, that the applicant has never been technically in peril and he could now be tried again. But it has been pointed out to us that he has been seven months in custody. In those circumstances, although it must be a matter for the prosecution, we should think it would not be right or necessary in the interests of justice to take further proceedings against him for the two cases in which he has been actually convicted, because he has served very nearly the term which he would have served if the magistrates had dealt with him. They could not have given him more than 12 months and might not have given him so much, and the remission would have to be taken into account. He has been in custody seven months, although he has been treated as a prisoner awaiting trial. The four cases outstanding, which have never been made the subject of a charge, although the applicant desired that they should be taken into consideration, are not now taken into consideration because the convictions are quashed, and whether the prosecution consider it right to proceed on those charges is a matter for them and not for this court. We express no opinion about it.

ORMEROD J.: I agree and have nothing to add.

PARKER J.: I agree.

Order for certiorari.

Solicitors: Cunliffe & Airy, agents for H. W. S. Homewood, Canterbury, for the applicant; W. L. Platts, Maidstone, for the respondent.

CIRCUIT CASE (NORTH-EASTERN CIRCUIT)

BEFORE

MR. JUSTICE LYNSKEY

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R. *v.* LAWSON

Fraudulent Conversion — Indictment — Charge of Conversion of General Balance.

The proposition of law in MORRIS (1933) 24 Cr.App.R. 105, that a count in an indictment should not charge the fraudulent conversion of a general balance is too wide and is in conflict with the earlier decisions. In an ordinary case, where it is possible to trace the individual items and prove a conversion of individual property or money, the items should not be included in a count charging the conversion of a general balance, and such a count may be bad for uncertainty; but in a case where the individual items cannot be traced in detail, yet if the evidence for the prosecution, if accepted, makes it clear that there has been a fraudulent conversion of either the whole or a part of a general balance at one time, it is proper to charge the conversion of a general balance on a day between specified dates.

Trial before Lynskey J. at Durham Assizes.

The defendant, Phyllis Newman Lawson, a solicitor, was charged in an indictment containing four counts. The first charged her with fraudulent conversion of property, contrary to section 20 (1) (iv) (*b*) of the Larceny Act, 1916, the particulars of offence alleging that on a day between April 5, 1950, and July 1, 1951, she fraudulently converted to her own use and benefit the sum of £2,519 6s. 2d. received by her for and on account of Fred Armour [a client of the defendant]. The third and fourth counts were in a similar form, but related to different sums of money received on a day between different dates for and on account of other clients. The second count charged her with fraudulent conversion as a trustee, contrary

to section 21 of the Act, the particulars of offence alleging that on a date between certain specified dates she, being a trustee of a stated sum of money, converted the same to her own use with intent to defraud. The evidence for the prosecution was to the effect that the defendant first paid money received by her for and on account of clients into her clients' account and that from about July, 1949, she drew from that account various sums which she then paid into her office account, and used part of the money so transferred for her own purposes, and that this went on until January, 1951. It was impossible to trace all the moneys so dealt with by the defendant from the office account back into the clients' account and thence to any particular client. In each count the sum alleged to have been fraudulently converted by the defendant was the balance due to a particular client, after giving credit in one count (count 4) for the sum standing to the credit of the clients' account. At the close of the case for the prosecution, counsel for the defendant submitted that the evidence on each count was insufficient to establish the charge, and further moved to quash the indictment on the ground that it was bad in law, as on each count what was charged was the fraudulent conversion of a general balance of account.

G. De P. Veale, Q.C., and *J. R. Cumming-Bruce*, for the Crown.

D. B. B. Fenwick and *O. Wrightson*, for the defendant.

LYNSKEY J.: Counsel for the defendant submits (i) that on each count of the indictment, as framed, the evidence adduced by the prosecution is not sufficient to establish the charge contained in that count, and (ii) that all the counts ought to be quashed on the ground that, in view of the evidence adduced, they charge the fraudulent conversion of a general balance of account, and in law such a count is bad. The case for the prosecution in answer to the first objection is that on the face of them the counts are regular. The prosecution say that on the evidence which they have adduced, if the

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jury accept it, there is ample material on which the jury could find the defendant guilty on one or more or all of those counts. The way in which the prosecution put their argument is that they are alleging here a fraudulent conversion of a sum, not on divers days between April 1, 1950, and July 1, 1951 (to take the first count), but a conversion on a day between those days. They say that the particular date does not matter, and that it is sufficient if the evidence is such as to satisfy a jury that there was a fraudulent conversion on one day between those particular dates. The prosecution say that the evidence which they have adduced clearly shows that there was a conversion between those dates. They further say that they are not called on to prove the conversion of the whole of the amount set out in each count in the indictment, but that it is sufficient, to enable a jury to find a verdict of fraudulent conversion, for them to be satisfied on the evidence that there was a fraudulent conversion of some part of that money on a day between the dates mentioned.

Authorities have been quoted to me to justify that contention, and it seems to me that the argument of the prosecution is correct. In the case of each of the counts they have called evidence to show that the defendant did receive moneys on account of the clients, or (in the case of the second count), of the beneficiaries. They produced both oral evidence and documents which confirmed it. It appears from the defendant's books, which were produced by her cashier, and from the witnesses who have given evidence that the amounts named in the counts in the indictment were, in fact, received by the defendant on behalf of her clients. Further, those books set out details of the expenses or charges or payments properly made against the moneys received, and in each case they show a balance due from the defendant to a particular person or persons on whose behalf the moneys were received. In the case of the first count, the amount actually charged is £2,519 6s. 2d., and that amount is actually shown in the books as being due from the defendant to a Mr. Fred Armour on August 29, 1950. The evidence goes further and shows that,

for nine or ten months after that date, Mr. Armour was continually asking for his money, that he was put off with excuses, and, ultimately, in the middle of 1951, the defendant told him that she was in monetary difficulties, but that eventually he would be paid, not only his money, but also the interest he was losing by her failure to pay. On those facts, coupled also with the fact that, after being compelled to go to another firm of solicitors, Mr. Armour has received payment of £1,010, and the balance has never been paid, it seems to me that there is ample evidence to enable the jury, if they accept it, to come to the conclusion that on some day during the period alleged there had been a conversion, and, if they were satisfied of an intention to defraud, a fraudulent conversion of at least part of that money.

The scheme adopted by the defendant, as outlined in the evidence for the prosecution, was that all moneys received on behalf of clients were paid into her clients' account as the Law Society's regulations require. She also had an office account for the general purposes of her business. The clients' account contained a mixed fund of the moneys of many clients. The defendant paid the amounts which she had received on behalf of clients into her clients' account quite regularly. According to the journal kept by her cashier, on or about July 1, 1949, the defendant commenced to draw from the clients' account various sums which ought not to have been drawn, except for the purpose of paying them to the clients and for or on their behalf. These amounts she paid into her office account, and this went on until January 12, 1951. The total amounts which were withdrawn by her from the clients' account and paid into the office account were, approximately, £4,050 over the whole period. The money so paid into the office account was used, in some cases, regularly, but, apparently, in other cases it was used by the defendant for purposes of her own—purposes for which she had no right to use it.

In those circumstances the prosecution submit that, although it is clear that there was a fraudulent conversion of the whole or part of the sum missing, it is impossible to trace

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the particular sums converted on any particular day from the office account through the clients' account to the particular account or trust of the client whose money was converted. The prosecution say, therefore, that, having regard to the method adopted by the defendant, they are entitled to take a sum—which happens to be the total sum which was due—and to say on the evidence that the jury must be satisfied that at least part of that sum was fraudulently converted on a day during the period named in the particular count. I have dealt with the first count. The same can be said with regard to the other counts and the evidence which supports them. So far as the second count is concerned, according to the entries in the books, on October 19, 1950, there was £493 13s. 9d. due from the defendant to the beneficiaries of the estate of Cyrus William Robinson, deceased. On February 14, 1951, there was £171 3s. 11d. due in respect of the estate of Emily Ann Kell, and with regard to the final account, the position was that a sum of £400 odd was due in respect of the amounts that ought to have been paid over in respect of the estate of William Chapman, deceased. The prosecution say that a certain sum was standing to the credit of the defendant's clients' account, and that credit has been given to the defendant for that amount and she is charged in the fourth count only with the difference between what remained in the clients' account and what remained unpaid.

In my view, the prosecution have adduced sufficient evidence to support the counts laid in the indictment. My ruling, so, far, is subject to the second submission made by counsel for the defendant, *viz.*, that, on the evidence, the amount named in each count was a general balance of account and a count charging fraudulent conversion of such a balance is bad in law. In support of his submission counsel relied on MORRIS (1933) 24 Cr.App.R. 105, which came before Lord Hewart C.J., Avory J. and Lawrence J. The headnote to the report reads: "A count in an indictment should not charge the fraudulent conversion of a general balance alleged to be due."

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The case was a curious one. In the first three counts the appellant was charged with embezzling moneys received by him for and on account of his employers, a company. The court found that there was nothing to show that the appellant was the clerk or servant of the company, and, therefore, he could not be convicted of embezzlement. The report of the case contains little information in regard to the facts and none in regard to the form of the counts in the indictment with which the court was dealing. Delivering the judgment of the court in regard to the fourth count, which is the only part of the judgment material for the purpose of my ruling, Lord Hewart C.J. said: "With regard to the fourth count, it is quite obvious that the appellant was charged with the fraudulent conversion of a general balance alleged to be due and that is a course which cannot properly be taken." No reasons are given for the decision, and, so far as argument is concerned, the only argument adduced for the appellant with regard to the count of fraudulent conversion was: "With regard to the count for fraudulent conversion, that was framed as alleging the conversion of a general balance alleged to be due."

Unfortunately BALLS (1871) L.R. 1 C.C.R. 328 was not cited in MORRIS'S CASE (*supra*), and, so far as one can see, it was not drawn to the attention of the court. In BALLS' CASE (*supra*) the prisoner, who was a member of a co-partnership, had to account on each Tuesday for money received in respect of the sale of coal. Each count of the indictment alleged a failure to account each Tuesday for items which the prisoner had received during the previous week in smaller amounts, and the point was taken on behalf of the prisoner that that was wrong, that the counts ought to have been for the individual smaller items received by him during the week and converted to his own use, and, therefore, the count charging the conversion of a balance for that period was bad. The case came before an extremely strong court consisting of Cockburn C.J., Willes, Mellor and Montague Smith JJ., and Channell B. Delivering the judgment of the court Cockburn C.J. said (at p. 332): "It is quite true that if a man receives a number of separate

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sums and has to account for each of them separately, only three instances of failure to account can be proved under one indictment." In other words, the court was applying the principle that, if there is a separate liability to account in respect of each item, it would be wrong to include a number of such items in the same count in the indictment. Cockburn C.J. went on to say: "Thus, if there were to be one accounting on Monday, and one on Tuesday, and one on Wednesday, and so on, only three defaults could be charged and proved; though even in such a case, evidence of other instances might be given in order to show that the instances charged were not merely accidental, but that what was done was done intentionally and fraudulently. But here no difficulty of this nature arises. I agree that the prisoner might have been indicted for embezzling any of the separate small sums received by him. But it appears upon the case that his duty was to receive the small sums from time to time; to send in the weekly accounts every Tuesday; and every Tuesday to pay the gross amount received by him during the preceding week into a bank. It is true that each of the small sums received had to be accounted for; but he might well be charged with embezzling the aggregate amount. And evidence of the individual items was admissible to show how this aggregate was made up. It would be very mischievous if, in such cases as these, servants could not be indicted for embezzling the aggregate amounts for which they fail to account. No doubt, in such cases, there is an embezzlement of each of the smaller sums going to make up the total not accounted for; but there is not the less an embezzlement of the whole." That is a strong judgment and, apparently, covers the case of what, over a short period, would be a general balance of account.

Before MORRIS (*supra*) there was another decision, SHEAF (1923) 19 Cr.App.R. 46, dealing with this matter. Avory J. who was a member of the court in MORRIS (*supra*), was also a member of the court in SHEAF (*supra*), and delivered the judgment of the court [the other members of the court being Sankey and Salter JJ.]. The question whether the counts were

had in law did not arise for decision because the case was dealt with on other grounds and, therefore, what Avory J. said on the point was obiter to the decision. He said (at p. 49): "Reference to the authorities relating to embezzlement, in which it has been made clear that it is not sufficient to charge the embezzlement of a general deficiency unless it appears that by the conduct or course of business it was the duty of the defendant on the date specified to hand over the lump sum which he had received, makes it clear that these two counts in the circumstances of this case were bad in law and ought to have been withdrawn from the jury." BALLS (*supra*) was not cited to the court, but the remarks of Avory J., would make it appear that he had that case in mind. The effect of what he said was that it is sufficient to charge a general deficiency if it appears by the conduct of the business in question that the practice is to account for the sums periodically.

In view of the words in the judgment of the court, delivered by Avory J. in SHEAF (*supra*), and having regard also to the decision in BALLS' CASE (*supra*), it seems to me that MORRIS (*supra*) is in conflict with the earlier decisions. It states the law too widely. There may be cases where it is proper to allege what, in effect, is a general deficiency if one can prove that there was a fraudulent conversion of either the whole or a part of it at one time. In those circumstances, in a case like the present, it seems to me that the prosecution would be undertaking an impossible task to try to trace all the moneys received by the defendant from the office account into the clients' account and thence to the moneys of any particular client or beneficiary. In a case of this kind, if the jury accept the evidence, it seems to me that there is ample material on which they can find that there was a fraudulent conversion of part, at least, of the property named in each count on one date. In my opinion, this is a proper case for the indictment to go forward in this form. I agree that in the ordinary case, where it is possible to trace the individual items and to prove a conversion of individual property and money, it is undesirable that one should include them all in a count alleging a general

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deficiency. Such a count may be bad for uncertainty, but in a case like this, where the individual items cannot be traced in detail, but where the evidence, if the jury accept it after hearing evidence for the defence, makes it clear that there has been a fraudulent conversion, it seems to me that the prosecution are entitled to frame their counts in the indictment in the way in which they have been framed here. In those circumstances, it seems to me that I must overrule the submission made by counsel for the defendant.

[The trial having proceeded, the jury found the defendant Guilty and she was sentenced to three years' imprisonment.]

Solicitor: K. L. Lupton, Sunderland, for the defence.

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STATEMENT ON CONDITIONAL BINDING OVER OF WITNESSES

The following statement was made by THE LORD CHIEF JUSTICE:—

The court desires to call the attention of magistrates, and more particularly of their clerks, to the desirability of exercising more frequently their powers of binding over witnesses conditionally under the provisions of section 13 of the Criminal Justice Act, 1925. The experience of judges on circuit is that this power is hardly ever exercised nowadays and consequently a great many witnesses are put to needless trouble in attending assizes or quarter sessions and much unnecessary expense is thereby incurred. Particular attention is directed to rules 8 and 9 of the Indictable Offences Rules, 1926, dealing with this matter. It frequently happens in cases of murder or manslaughter, to take common instances, that several witnesses have to be called to prove the identification or the disposal or care of the body of the deceased or the

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sending of parts of the body for analysis or matters of that sort. The evidence of these witnesses is nearly always purely formal and if there is no challenge of their evidence they should only be conditionally bound over. So, too, in cases where the carriage or delivery of goods has to be traced, may be through several hands; and it is also particularly desirable that medical men should only be conditionally bound over if their evidence is unchallenged and really only formal, as so often is the case in charges of carnal knowledge or of wounding where there is no dispute as to the nature and extent of the injuries.

These instances are illustrative only and are not intended to be exhaustive. Ample provision is made by the rules for securing the attendance at the trial of witnesses conditionally bound over if they are needed, and it is to be hoped that this power will be used much more freely than in the past. The committing justices must inform the accused of his right to require the attendance of a witness conditionally bound over and of the steps to be taken for securing his attendance.

[IN THE HOUSE OF LORDS]

BEFORE

VISCOUNT SIMON, LORD PORTER, LORD OAKSEY, LORD MORTON OF HENRYTON AND LORD TUCKER

FRANK HERBERT HARRIS

1952
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Evidence—Similar Acts—Proof of Intent or Mens Rea—Rebuttal of Possible Defence—Prosecution not Obliged to Wait till Specific Defence Set Up—Prejudice—Discretion of Judge to Exclude.

The prosecution are entitled to adduce all proper evidence tending to prove the charge against the prisoner, including evidence tending to show that the prisoner has been guilty of

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criminal acts other than those covered by the indictment without waiting for the prisoner to set up a specific defence calling for rebuttal. Evidence of similar facts may be admissible to prove intention or *mens rea*, as well as to rebut a possible defence of accident.

Even where such evidence is strictly admissible, the judge has a discretion to exclude it if its prejudicial effect will be out of all proportion to its evidential value.

Dicta of Lord Herschell in MAKIN *v.* ATT.-GEN. FOR NEW SOUTH WALES [1894] A.C. 57, at p. 65, and Lord du Parcq in NOOR MOHAMED *v.* R. [1949] A.C. 182, at p. 190, applied.

Observations of Lord Sumner in THOMPSON *v.* DIRECTOR OF PUBLIC PROSECUTIONS, 43 Cr.App.R. 61, at p. 78; [1918] A.C. 221, at p. 232 commented on.

The appellant, a police officer, was indicted on an indictment containing eight counts, all of which charged him with office-breaking and larceny at the same premises on various dates in May, June and July, 1951. The evidence disclosed in the depositions with regard to the last count was that, after a burglar alarm had rung at the premises two detectives had seen the appellant at the end of a narrow passage near the premises, that when they waved to him he took no notice of them, that a few moments later he arrived at the premises, looking pale and agitated, having passed a coalbin in which the stolen property was subsequently found. With regard to the first seven counts the evidence did not disclose the appellant's presence at or near the premises, but showed that he was on duty in the neighbouring market on every occasion, that neither he nor any other officer on duty had seen anyone who might have been the thief, and that each of the offences displayed certain similar features. The appellant's defence with regard to the eighth count was that his presence at the place where he was seen was a coincidence due to the course of a patrol which it was his duty to perform. The judge refused to accede to an application by the defence for the separate trial of the eighth count, holding that the evidence on the whole indictment would be admissible on any one count.

Held, (i) that the judge had properly exercised his discretion in deciding that the eight counts should be tried together; but (ii) (Lord Oaksey dissenting on this point) that, as the judge had failed to warn the jury that the evidence called in support of the first seven counts did not in itself provide confirmation of the eighth count, and that the case against the appellant on the eighth count depended on the facts relating to that date, the conviction must on that ground be quashed.

Decision of the Court of Criminal Appeal (35 Cr.App.R. 185) reversed.

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Appeal by the prisoner from an order of the Court of Criminal Appeal dismissing his appeal against conviction (35 Cr.App.R. 185).

The appellant, a police officer, in the City of Bradford police force, was convicted at Leeds Assizes on November 13, 1951, of office-breaking and larceny and was sentenced by Pearson J. to 12 months' imprisonment.

The indictment contained eight counts for office-breaking and larceny at the same premises in Bradford Market on a series of dates in May, June and July, 1951, and the appellant was convicted on the last count only. All the offences disclosed certain features of similarity, particulars of which appear in the speech of Viscount Simon. With regard to the first seven counts there was no evidence that the appellant had been at or near the premises, beyond the fact that he had been on duty on each occasion in the neighbouring market, and there was no evidence that either he or any other officer had seen anyone who might have been the thief. With regard to the last count the evidence was that between 6 and 7 a.m. on July 22, 1951, after a burglar alarm at the premises had rung, the appellant who, as before, was on solitary duty in the market, was seen by two detectives at the end of a passage near the premises, that he took no notice of them when they waved to him, and that a few moments later the appellant arrived at the premises, looking pale and agitated, having passed a coalbin in which the stolen property was subsequently found. An application was made by the defence to Pearson J. to order that the eighth count be tried separately and before the others, but the judge declined to order a separate trial, holding that the evidence on the whole indictment would be admissible on any one count.

The appellant appealed against his conviction to the Court of Criminal Appeal. The appeal was heard by the court (the Lord Chief Justice, Mr. Justice Byrne and Mr. Justice Parker), on January 22 and 29, 1951, and dismissed.

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H. Burton, Q.C., for the appellant:

The grounds of appeal are (1) that the judge wrongly refused the application of the defence for a separate trial of the eighth count; (2) that he was wrong in holding that the evidence relating to the first seven counts was admissible on the eighth; and (3) that he was wrong in leaving the first seven counts to the jury. The second is the substantial ground. On the eighth count, the issue for the jury was, did the appellant commit the offence on July 22? The evidence relating to the first seven offences did not assist to prove that, because there was no identification of anyone in relation to any of those offences, and certainly no positive identification of the appellant. All that was proved was that at some portion of the period during which the offences were committed, which ranged from 72 hours to 8 hours, the appellant was on duty and that his beat would have brought him to the vicinity of the entered premises. Evidence was also given that no offences of this kind were committed during the appellant's annual leave, which lasted for a fortnight, though the period of absence of offences extended to a month. This was a most prejudicial piece of evidence and in no way went to prove the appellant's guilt in relation to the offence of July 22. Evidence of similar offences has never been admitted in a case of breaking and entering. To be admissible, such evidence must fall under one of five recognised heads: (1) to prove system, which means a system followed by the accused person; (2) to rebut a defence of accident or mistake, which means a defence "raised, raisable or open" to the accused person. There must have been some indication that the accused person relied, or intended to rely, on the defence. That is the effect of the modification of the decision in SIMS, 31 Cr.App.R. 158; [1946] K.B. 531, by the later decisions of NOOR MOHAMED *v.* R. [1949] A.C. 182, and HALL, 35 Cr.App.R. 167; [1952] 1 K.B. 302. No such defence was raised in the present case; (3) to rebut a defence of innocent intent, as on a charge of uttering counterfeit coins. [He referred also to OLLIS [1900] 2 Q.B. 758, and BOND [1906] 2 K.B. 389]; (4) to show vicious or unnatural propensity; (5) to

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prove identity in a particular offence, that is to say, to negative a defence of mistaken identification. [He referred to THOMPSON *v.* DIRECTOR OF PUBLIC PROSECUTIONS, 13 Cr.App.R. 61; [1918] A.C. 321.] These categories cannot be added to so as to render evidence of similar acts admissible to negative a defence of coincidence, and this House should resist any erosion of the rule of the admissibility of such evidence to rebut a defence laid down in MAKIN *v.* ATT.-GEN. FOR NEW SOUTH WALES [1894] A.C. 57. Mere evidence of opportunity has never been held to be admissible. The most that the evidence of the earlier offences in this case proved was that some person had broken into the premises, and that the appellant had the opportunity of doing so. The first seven counts were really included in the indictment only as a makeweight, and the fact that it is alleged that there were similar features in all the crimes cannot affect the question of the admissibility of the first seven in the absence of any identification of the appellant with them. If the evidence of the earlier offences was not admissible, it clearly was prejudicial in the highest degree to the appellant and it cannot be said that without that evidence a reasonable jury would have convicted.

On the question of separate trial the Indictments Act, 1915, which is purely procedural, did not alter the law of evidence. Though the matter is, to a large extent, one for the discretion of the judge at the trial, the matter is not purely one of discretion. The discretion is exercisable subject to the laws of evidence and the judge must, at any rate, have regard to the question whether the evidence relating to one count would be admissible on another count. The only case where separate trials have been refused, when there was no connection between the defendant and some of the charges, appears to be BAILEY (1847) 2 Cox C.C. 311, a decision which should not be followed in view of the later decisions. Section 5 (3) of the Indictments Act, 1915, envisages that separate trials shall take place where the court is of opinion that the defendant may be prejudiced or embarrassed in his defence if this course is not followed, and though the Court of Criminal Appeal will not generally interfere

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with the exercise of a judge's discretion in this matter, it will do so where the exercise of the discretion has resulted in a miscarriage of justice: GRONDKOWSKI AND ANOTHER, 31 Cr.App.R. 116; [1946] K.B. 369.

On the last ground of appeal, the fair inference is that in arriving at their verdict the jury must have considered all the incidents, which they ought not to have had the opportunity of doing.

R. Lyons, following for the appellant:

Even if the counts were properly tried together, the judge should have warned the jury that the evidence relating to each count must be considered separately: BAILEY, 18 Cr.App.R. 42; [1924] 2 K.B. 300. There was no such warning in the present case. No submission was made at the close of the case for the prosecution that there was no evidence fit to be left to the jury on any of the first seven counts, because the defence took the view that that point had already been decided by the judge.

The Attorney-General (*Sir Lionel Heald, Q.C.*), for the Crown:

It is conceded that there would have been a fundamental difference if the jury had been directed not to consider any of the evidence relating to the first seven counts. The evidence of those counts was admissible only if the broad principle referred to in SIMS (*supra*) applies. That there is a doubt on the present position is clear from a comparison between Roscoe's Criminal Evidence, 16th ed., p. 102, and Kenny's Outlines of Criminal Law, 16th ed., p. 552. The first proposition set out in the headnote to the report of SIMS in the Law Reports: "Where several counts are joined in one indictment, the mere fact that evidence is admissible on one count and inadmissible on another is not in itself a ground for directing separate trials, unless the prejudice created by such evidence would be improper and too great to be overcome by any direction in the summing-up" is not open to objection. The second proposition: "Evidence that the accused has a bad reputation or a bad disposition is to be excluded only if it shows nothing

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more. Where it relates also to other acts having specific features connecting the accused with the crime charged, it is admissible, irrespective of the issues raised by the defence" is open to doubt. The question whether the evidence objected to in this case was admissible must be decided before it can be said whether harm was done or not. That question falls into two parts: (1) Was the evidence of previous similar facts admissible on well-recognised principles? (2) Was the actual evidence given in the present case admissible? On the first question the history of the matter shows quite clear principles if the main current of authority is followed and there is no engagement in exploration. The main current of authority shows that such evidence is admissible only in rebuttal in the strict sense, and further that the evidence itself must be strictly relevant for the purpose of rebutting specific facts or allegations. It must not be in the form of a general reply that the defendant is an undesirable person; further, the evidence must identify the defendant in connection with previous similar acts, though such identification need not be visual, and may be circumstantial. In SIMS (*supra*) the Court of Criminal Appeal held that such evidence need not be given only in rebuttal in the strict sense, and that a plea of Not Guilty entitled the prosecution to introduce evidence of similar facts, and that the defendant need not have set up or indicated any affirmative defence.

It may be argued in the present case that the evidence relating to the first seven counts was not admissible, because it was not evidence of similar facts, but mere prejudice. The fact that some of the evidence on the first seven counts is of no probative value on the eighth count was no reason for not trying the counts together, but the summing-up should have warned the jury to distinguish the evidence relating to the respective counts. The Crown accept the proposition that, if there was a misdirection it cannot be assumed that the verdict of the jury would have been the same apart from such misdirection, and do not ask the House to apply the proviso to section 4 (1) of the Criminal Appeal Act, 1907. The Crown

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also agree with the proposition that there should be no erosion of the rule laid down in MAKIN *v.* ATT.-GEN. FOR NEW SOUTH WALES (*supra*). That authority stands like a rock in the bank of a flooded river, and the modern developments from it—SMITH (1915) 11 Cr.App.R. 229; ARMSTRONG, 16 Cr.App.R. 149; [1922] 2 K.B. 555; BYWATERS (1922) 17 Cr.App.R. 66, and HALL (*supra*)—are like stepping-stones leading into deep water. The real question is, what is meant by evidence being "relevant"? If evidence is otherwise relevant, it is not to be excluded merely because it is prejudicial. Relevant, however, does not necessarily mean logically probative. The real nigger in the wood pile has been an article by Lucius Stone in the Harvard Law Review of 1932, Vol. 46, pp. 954 *et seq.*, which suggests that all matters having sufficient probative value can be given in evidence. PERKINS *v.* JEFFERY [1915] 2 K.B. 702, on the other hand, suggests that evidence relating to another occasion should not be given unless and until a defence has definitely been put forward. That is not a complete statement of the law, because in some cases there is no need to wait until a defence which could reasonably be anticipated has been put forward, *e.g.*, where it is sought to establish *mens rea*; Kenny's Outlines of Criminal Law, 16th ed., p. 583. It has always been repugnant to the practice of the English courts that a man's record should be used against him. Lucius Stone in this article argued that there never was any such rule in English law, but the Crown concede that there is such a rule now. If a man's previous record cannot be used against him, *a fortiori* previous suspicious circumstances should not be proved against him without identification. If one of the propositions laid down in SIMS (*supra*) was that anything which helps to prove guilt can be introduced, it is not sought to support that aspect of the decision. Under French law the court has to support a *conviction intime* and the judge requires all the available evidence as to the prisoner's reputation. In English law, only the facts of the particular case are being tried and the courts are now in the position of referees whose duty it is to see whether there has been compliance with the rules. HALL

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(*supra*) contains a dangerous statement of the law (35 Cr.App. R. 167, at p. 177; [1952] 1 K.B. 302, at p. 307): "As soon as it becomes clear that the prisoner's defence is that the facts alleged by the prosecution have an innocent and not a guilty complexion, then evidence may be given which otherwise might be inadmissible, and it is not the less admissible because it shows, or tends to show, that the prisoner has been guilty of another offence." That is a development of the speech of Lord Sumner in THOMPSON *v.* DIRECTOR OF PUBLIC PROSECUTIONS (13 Cr.App.R. 61, at p. 78; [1918] A.C. 221, at p. 222). All the decisions have emphasised that regard must be had to the nature of the evidence which will be accepted in such case. Evidence which has the indirect effect of identifying the accused person may be sufficient. [He referred to MORTIMER (1936) 25 Cr.App.R. 150, at p. 157.] It is conceded that the decisions in SIMS (*supra*) and MAKIN *v.* ATT.-GEN. FOR NEW SOUTH WALES (*supra*) cannot stand together. The question of the admissibility of the actual evidence admitted in the present case will be dealt with by Mr. Hylton-Foster.

H. B. H. Hylton-Foster, Q.C. (*J. S. Snowden* with him), following for the Crown:

The question is, was the evidence with regard to counts 1 to 7 shown to be evidence relating to the appellant on the whole of the case? If so, it was rightly admitted. The prosecution proved in relation to July 22 facts which bore the appearance of guilt such as to require of the appellant an explanation consistent with innocence. The appellant, in an interview with his inspector, gave such an explanation. At that point an issue was raised on which it was right for the prosecution to call evidence of other similar thefts, and that became evidence of previous thefts committed by the appellant. There were two factors pointing to the appellant's guilt in relation to the offence of July 22—(1) his position immediately after the theft, and (2) his refusal to recognise the two detectives who spoke to him and whom he knew well. He had to explain why at that point of time he had brought his beat to that particular

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place. The evidence admitted tended to show that the earlier offences had characteristics in common with the offence of July 22 which linked them with the appellant; (1) on each occasion only part of the available money was taken; (2) the appellant had the opportunity of committing the whole range of offences; (3) both the thief and the appellant had special opportunity at week-ends; (4) the thief was a person who aroused no attention and no intruder was ever seen; (5) the thief and the appellant refrained from using available opportunities at the times when the appellant was away. All these factors tend to establish the relevance of the evidence with regard to the earlier offences to the last count.

H. Burton, *Q.C.*, in reply:

It is not desired to add anything on the main point. With regard to the admission of evidence of similar facts, there was no dispute that the money was stolen and no question of *mens rea* entered into the problem. It was not right to introduce evidence of similar offences merely to rebut the appellant's statement when no question of innocent or guilty intent was in issue. None of the evidence relating to the previous occasions went so far as to connect the appellant with the theft. [He referred to THOMPSON *v.* DIRECTOR OF PUBLIC PROSECUTIONS (13 Cr.App.R. 61, at p. 82; [1918] A.C. 221, at p. 236.] Often no thefts occurred when the appellant was on duty. The first proposition in the headnote to SIMS in the Law Reports (*supra*) is not challenged; but the second proposition, it is submitted, is wrong.

With regard to the application of the proviso to section 4 (1) of the Criminal Appeal Act, 1907, it is not usual to apply the proviso where inadmissible evidence has been admitted. If the judge had excluded the evidence relating to the first seven counts, the jury might still have convicted, but it cannot be said that they must necessarily or would probably have done so.

[*H. B. H. Hylton-Foster*, *Q.C.*, referred to WHYBROW (1951) 35 Cr.App.R. 141, as an instance of the application of the proviso despite a substantial misdirection in law.]

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. At the conclusion of the arguments the House received the report of the Appeal Committee recommending that the appeal should be allowed and adjourned for further consideration.

April 9.—The following opinions were read:—

VISCOUNT SIMON: My Lords, this is an appeal from a decision of the Court of Criminal Appeal which comes before the House in consequence of a certificate given by the Attorney-General that the decision involves a point of law of exceptional public importance and that it is desirable in the public interest that a further appeal should be brought.

The appellant was a member of the city of Bradford police force. He was tried at the Leeds autumn assizes last November before Pearson J. on an indictment containing eight counts charging him with office-breaking and larceny on a series of dates in May, June and July, 1951, by breaking into and entering the premises of a company of fruit and vegetable merchants situated in an enclosed and extensive Bradford market and stealing therefrom various sums of money. In every case the money stolen was only a part of the amount that the thief, whoever he was, might have taken. In every case the same means of access was used, and in every case the theft occurred in a period during part of which the appellant was on duty in uniform in the course of patrolling the market, and, apparently, at an hour when most of the gates to the market were closed to the general public. But, on the first seven of these occasions, there was no further evidence to associate the appellant specifically with the thefts. On the eighth occasion, however, which was between 6 and 7 a.m. on Sunday morning, July 22, the appellant, who was on solitary duty in the market as before, was found to be just outside the premises by two detective officers who had rushed to the spot on hearing, in the quarters where they were secretly waiting, the ringing of a bell actuated, without the knowledge of the appellant, by the thief's weight when he stepped on the floor of the shop. On this occasion, marked money which had been

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placed in the till had been abstracted, but it was not found on the appellant when he was arrested. It had been concealed in a coal-bin, not far away from where he was when first seen. The two detectives were well known to the appellant and might have been expected to be at once recognised by him, but when they entered the market, one by climbing over a gate and the other by opening it with some difficulty, though they were in the appellant's view at no great distance, he contended that he had not recognised them at first as members of the police force and so had not moved to join them. He said he thought they were market-men entering the area for some innocent purpose. By the time the two detectives had reached the premises he had disappeared from view and a little later came running up to join them. The time which elapsed between their first sight of him and his return was just sufficient to enable him to have reached the coal-bin and come back.

Before the appellant was arraigned and in the absence of the jury, his counsel asked for the severance of the indictment and urged that the charge contained in the eighth count should be tried first and separately. The learned judge applied section 5 (3) of the Indictments Act, 1915, and ruled that there was no good reason for ordering a separate trial on the eighth count and that the case fell within rule 3 of Schedule I to the Act, since the charges formed part of a series of offences of the same or a similar character. In so deciding, the learned judge was rightly exercising his discretion and no valid objection could be taken to his ruling. It was urged that the first seven counts, if taken alone, would be unsupported by any relevant evidence. But to this the answer was suggested that, if a jury took the view that the resemblance between the different thefts was so close that they must be regarded as the work of a single thief, the evidence of what happened on July 22 might be considered as identifying the criminal on all counts. The jury, however, returned, as it was entitled to do, a verdict of Not Guilty on the first seven counts, but found the appellant Guilty on the eighth count. He appealed to the Court of Criminal Appeal against this conviction on various grounds, to one of which

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reference must be made hereafter. His appeal was dismissed, but, as already stated, he obtained the certificate of the Attorney-General that the decision of the Court of Criminal Appeal involved a point of law of exceptional public importance and that a further appeal should be brought. The Criminal Appeal Act, 1907, s. 1 (6), while conferring this power on the Attorney-General, does not require that his certificate should indicate what is the point of law which he considers should in the public interest be thus brought for final decision before this House. In the present instance, moreover, the House was without the assistance usually derived from previous written formulation of the arguments and reasons put forward on either side. On the hearing of the appeal, however, counsel for the appellant made it clear that his main contention was that evidence as to the thefts that had occurred on the first seven occasions, when the accused was not shown to be near the shop at the time when they occurred, could not be advanced by the prosecution or considered by the jury as part of the material to prove the charge on the eighth occasion. The Attorney-General presented the problem arising on the appeal more widely and in effect invited the House to deal with a series of authorities beginning with MAKIN *v.* ATT.-GEN. FOR NEW SOUTH WALES [1894] A.C. 57, in which limits as to the admissibility of evidence of "similar facts" had been suggested or laid down, and to decide whether the principle enunciated in MAKIN'S CASE (*supra*) should now be treated as modified or its application regarded as extended.

In my opinion, the principle laid down by Lord Herschell L.C. in MAKIN'S CASE (*supra*) remains the proper principle to apply, and I see no reason for modifying it. MAKIN'S CASE (*supra*) was a decision of the Judicial Committee of the Privy Council, but it was unanimously approved by the House of Lords in BALL (6 Cr.App.R. 31; [1911] A.C. 47) and has been constantly relied on ever since. It is, I think, an error to attempt to draw up a closed list of the sort of cases in which the principle operates. Such a list only provides instances of its general application, whereas what really matters is the

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principle itself and its proper application to the particular circumstances of the charge that is being tried. It is the application that may sometimes be difficult, and the particular case now before the House illustrates that difficulty. The principle as laid down by Lord Herschell L.C. ([1894] A.C. at p. 65), is as follows: "It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused." When Lord Herschell speaks of evidence of other occasions in which the accused was concerned as being admissible to "rebut" a defence which would otherwise be open to the accused, he is not using the vocabulary of civil pleadings and requiring a specific line of defence to be set up before evidence is tendered which would overthrow it. If it were so, instances would arise where the magistrates might be urged not to commit for trial, or it might be ruled at the trial, at the end of the prosecution's case, that enough had not been established to displace the presumption of innocence, when all the time evidence properly available to support the prosecution was being withheld. Avory J., in giving the judgment of the Divisional Court in PERKINS *v.* JEFFERY said ([1915] 2 K.B. 702, at p. 707): ". . . in criminal cases, and especially in those where the justices have summary jurisdiction, the admissibility of evidence has to be determined in reference to all the issues which have to be established by the prosecution, and frequently without any indication of the particular defence that is going to be set up."

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Lord du Parcq pointed out in NOOR MOHAMED *v.* R. ([1949] A.C. 182, at p. 191), in commenting on what Lord Sumner had said in THOMPSON *v.* DIRECTOR OF PUBLIC PROSECUTIONS (13 Cr.App.R. 61, at p. 78; [1918] A.C. 221, at p. 232): "An accused person need set up no defence other than a general denial of the crime alleged. The plea of Not Guilty may be equivalent to saying: 'Let the prosecution prove its case, if it can,' and, having said so much, the accused may take refuge in silence. In such a case it may appear (for instance) that the facts and circumstances of the particular offence charged are consistent with innocent intention, whereas further evidence, which incidentally shows that the accused has committed one or more other offences, may tend to prove that they are consistent only with a guilty intent. The prosecution could not be said, in their Lordships' opinion, to be 'crediting the accused with a fancy defence' if they sought to adduce such evidence."

Lord Herschell's statement in MAKIN'S CASE (*supra*) that evidence of "similar facts" may sometimes be admissible as bearing on the question whether "the acts alleged to constitute the crime charged in the indictment were designed or accidental" deserves close analysis. Sometimes the purpose properly served by such evidence is to help to show that what happened was not an accident. If it was, the accused had nothing to do with it. Sometimes the purpose is to help to show what was the intention with which the accused did the act which he is proved to have done. In a proper case, and subject to the safeguards which Lord Herschell indicates, either purpose is legitimate. Scrutton J. points out the distinction very clearly in BALL'S CASE (6 Cr.App.R. 238; [1911] A.C. 47, at p. 52). Sometimes the two purposes are served by the same evidence. The substance of the matter appears to me to be that the prosecution may adduce all proper evidence which tends to prove the charge. I do not understand Lord Herschell's words to mean that the prosecution must withhold such evidence until after the accused has set up a specific defence which calls for rebuttal. Where, for instance, *mens*

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rea is an essential element in guilt, and the facts of the occurrence which is the subject of the charge, standing by themselves, would be consistent with mere accident, there would be nothing wrong in the prosecution seeking to establish the true situation by offering, as part of its case in the first instance, evidence of similar action by the accused at another time which would go to show that he intended to do what he did on the occasion charged and was thus acting criminally. MORTIMER ((1936) 25 Cr.App.R. 150) is a good example of this. What Lord Sumner meant in THOMPSON *v.* DIRECTOR OF PUBLIC PROSECUTIONS (*supra*) when he denied the right of the prosecution to "credit the accused with fancy defences" was that evidence of similar facts involving the accused ought not to be dragged in to his prejudice without reasonable cause.

There is a second proposition which ought to be added under this head. It is not a rule of law governing the admissibility of evidence, but a rule of judicial practice followed by a judge who is trying a charge of crime when he thinks that the application of the practice is called for. Lord du Parcq referred to it in NOOR MOHAMED'S CASE immediately after the passage above quoted, when he said (at p. 192): "... in all such cases the judge ought to consider whether the evidence which it is proposed to adduce is sufficiently substantial, having regard to the purpose to which it is professedly directed, to make it desirable in the interest of justice that it should be admitted. If, so far as that purpose is concerned, it can in the circumstances of the case have only trifling weight, the judge will be right to exclude it. To say this is not to confuse weight with admissibility. The distinction is plain, but cases must occur in which it would be unjust to admit evidence of a character gravely prejudicial to the accused even though there may be some tenuous ground for holding it technically admissible. The decision must then be left to the discretion and the sense of fairness of the judge."

This second proposition flows from the duty of the judge when trying a charge of crime to set the essentials of justice above the technical rule if the strict application of the latter

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would operate unfairly against the accused. If such a case arose, the judge may intimate to the prosecution that evidence of " similar facts " affecting the accused, though admissible, should not be pressed because its probable effect " would be out of proportion to its true evidential value ": *per* Lord Moulton in CHRISTIE (10 Cr.App.R. 141, at p. 160; [1914] A.C. 545, at p. 559). Such an intimation rests entirely within the discretion of the judge. It is, of course, clear that evidence of " similar facts " cannot in any case be admissible to support an accusation against the accused unless they are connected in some relevant way with the accused and with his participation in the crime: see Lord Sumner in THOMPSON *v.* DIRECTOR OF PUBLIC PROSECUTIONS (13 Cr.App.R. 61, at p. 80; [1918] A.C. 221, at p. 234). It is the fact that he was involved in the other occurrences which may negative the inference of accident or establish his *mens rea* by showing " system," or, again, the other occurrences may sometimes assist to prove his identity, as, for instance, in PERKINS *v.* JEFFERY (*supra*). But evidence of other occurrences which merely tend to deepen suspicion does not go to prove guilt. This is the ground, as it seems to me, on which the Judicial Committee of the Privy Council allowed the appeal in NOOR MOHAMED'S CASE (*supra*). The Board there took the view that the evidence as to the previous death of the accused's wife was not relevant to prove the charge against him of murdering another woman, and if it was not relevant it was at the same time highly prejudicial. It is to be noted that the Judicial Committee did not question the decision in SIMS (31 Cr.App.R. 158; [1946] K.B. 531).

It remains to examine certain reported cases dealing with the admissibility of evidence of " similar facts " decided since MAKIN'S CASE (*supra*), to which the Attorney-General referred us. Rightly understood, these cases do not seem to me to involve any enlargement of the area within which evidence of " similar facts " might be admitted. In SMITH ((1915) 11 Cr.App.R. 229) the accused was charged with murdering a woman, immediately after going through a form of marriage with her, by drowning her in a bath in the lodging where they

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were staying. Evidence was held to be rightly admitted of very similar circumstances which connected the accused with the deaths, at a later date, of two other women who were drowned in their baths after the accused had gone through a form of marriage with each of them in turn. In all three cases it was shown that the accused benefited by the death. In all three cases the prisoner urged the woman to take a bath and was on the premises when she prepared to do so. The ground on which the evidence of the two later occurrences was admissible was that the occurrences were so alike, and the part taken by the accused in arranging what the woman would do was so similar in each case, as to get rid of any suggestion of accident. The decision in SMITH'S CASE (*supra*), therefore, involved no extension of the principle laid down in MAKIN'S CASE (*supra*). The challenged evidence was admissible both to show that what happened in the case of the first woman was not an accident and also to show what was the intention with which the accused did what he did. In ARMSTRONG (16 Cr.App.R. 149; [1922] 2 K.B. 555) the accused was indicted for the murder of his wife by administering arsenic to her. The wife was shown to have died from arsenical poisoning, but the defence urged that it was not shown that the husband had administered the poison to her, but that she had committed suicide. The accused had purchased a quantity of arsenic and made it up into a number of small packets, each containing what would constitute a fatal dose, but offered the explanation that he had purchased the poison merely to use it as a weed-killer in his garden. The prosecution called evidence to show that, eight months after the death of his wife, he secretly administered arsenic to another person. The Court of Criminal Appeal held that this evidence was admissible because it went to disprove the suggestion that he had purchased and kept arsenic for an innocent purpose. The decision in ARMSTRONG'S CASE (*supra*) appears to me to involve no enlargement of the principle in MAKIN'S CASE (*supra*). Lord Hewart C.J. rightly observed (16 Cr.App.R., at p. 157; [1922] 2 K.B., at p. 566): "The fact that he was subsequently found not

merely in possession of but actually using for a similar deadly purpose the very kind of poison that caused the death of his wife was evidence from which the jury might infer that that poison was not in his possession at the earlier date for an innocent purpose. . . .'' I do not find anything in the report of Bywaters ((1922) 17 Cr.App.R. 66) which could be read as extending the principle of Makin's Case (*supra*).

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In Sims (*supra*) there is a passage in the judgment of Lord Goddard C.J. which appears to have raised doubts in some quarters whether the principle in Makin's Case (*supra*) was being extended. The Lord Chief Justice observed (31 Cr.App. R. 158, at p. 167; [1946] K.B. 531, at p. 539) that one method of approaching the relevant problem is to start with the general proposition that all evidence that is " logically probative " is admissible unless excluded by established rules, and that it would follow that evidence for the prosecution " is admissible irrespective of the issues raised by the defence." It is the words " logically probative " which have raised doubts in some minds. Such a phrase may seem to invite philosophic discussion, which would be ill suited to the practical business of applying the criminal law with justice to all concerned. But I do not understand the Lord Chief Justice by the use of such a phrase to be enlarging the ambit of the principle in Makin's Case (*supra*) at all, or to be disregarding the restrictions which Lord Herschell indicated. In one sense, evidence of previous bad conduct, or hearsay evidence, might be regarded as having, logically, a probative value, but, of course, the judgment in Sims' Case (*supra*) is not opening the door to that. I understand the passage quoted to mean no more than what I have already formulated, *viz.*, that the prosecution may advance proper evidence to prove its case without waiting to ascertain what is the line adopted by the defence. Lord du Parcq in Noor Mohamed's Case ([1949] A.C. 182, at p. 194), points out the possibility of misunderstanding the Lord Chief Justice's words and proceeds to put his own construction on them. In substance, I agree with his interpretation. There is, however, this to be added. The proper working of the criminal law in

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this connection depends on the due observance of both the propositions which I have endeavoured to expound in this judgment. While the prosecution may adduce all proper evidence which tends to prove the charge, it must do so with due regard to the warnings contained in the judgments of Kennedy J. in BOND ([1906] 2 K.B. 389, at p. 398) and Viscount Sankey L.C. in MAXWELL *v.* DIRECTOR OF PUBLIC PROSECUTIONS (24 Cr.App.R. 152, at p. 172; [1935] A.C. 309, at p. 320). A criminal trial in this country is conducted for the purpose of deciding whether the prosecution has proved that the accused is guilty of the particular crime charged, and evidence of "similar facts" should be excluded unless such evidence has a really material bearing on the issues to be decided. This, in my opinion, is the way in which Lord Sumner's observations in THOMPSON'S CASE (13 Cr.App.R., at p. 78; [1918] A.C., at p. 232) should be regarded. It should be noted that in that case Lord Parker of Waddington (13 Cr.App.R., at p. 77; [1918] A.C., at p. 231) was careful to insist that it would be wrong to treat the decision as "laying down any principle capable of general application." With this explanation, I see no reason to differ from the conclusion in SIMS' CASE (*supra*). I have already expressed my view of the explanation of the decision in NOOR MOHAMED'S CASE (*supra*). It appears to me to turn on the court's view of the relevance of the earlier facts. So regarded, it is not an authority which ought to raise doubts as to the proper application of the principle in MAKIN'S CASE (*supra*), or as disturbing the two governing propositions which I have set out above.

Lastly, I must refer to HALL (35 Cr.App.R. 167; [1952] 1 K.B. 302. The way in which the judgment of Lord Goddard C.J. in that case was framed was manifestly in deference to the passage in NOOR MOHAMED'S CASE (*supra*), which I have already discussed. On any view, the decision of the Court of Criminal Appeal was right, and I trust that the decision now being given by this House may serve to clear up some of the perplexities which HALL'S CASE (*supra*) showed to have arisen. It must always be remembered that every case is decided on its own

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facts, and expressions used, or even principles stated, when the court is considering particular facts, cannot always be applied as if they were absolute rules applicable in all circumstances.

Applying the above general propositions to the case before us, it appears to me that the only difficulty arises from the form of the summing up. The learned judge, having decided that the eight counts should be tried together, did not warn the jury that the evidence called in support of the earlier counts did not in itself provide confirmation of the last charge. Yet, if the eighth count had been the only charge to be tried, it is difficult to see how the fact that there had been similar thefts of the same pattern before would confirm the allegation that the appellant was the thief on July 22. The eighth count raised two issues: (i) Was the money stolen on July 22? (ii) Is it proved that it was the appellant who stole it? Previous events could not confirm (i), which, indeed, was proved beyond dispute. As for (ii), the accused denied that he was the thief and the fact that someone perpetrated the earlier thefts when the appellant may have been somewhere in the market does not provide material confirmation of his identity as the thief on the last occasion. The case against him on July 22 depended on the facts of that date. Yet the jury may well have been swayed, however illogically, in reaching its verdict on the eighth count by the earlier evidence. It should have been warned of this danger, especially as SIMS' CASE (*supra*) shows that on an indictment containing several counts evidence may be given which supports only some of them: see the observations of Lord Hewart C.J. in BAILEY (16 Cr.App.R. 42; [1924] 2 K.B. 300). One of the grounds stated in the appellant's notice of appeal to the Court of Criminal Appeal was that the learned judge failed to direct the jury that it was its duty to consider each count separately and not to be influenced in its decision on the eighth count by the evidence of the earlier thefts. The learned judge did, indeed, in his summing up, go through each count separately, but he treated the evidence as cumulative and told the jury that the main question was whether it was satisfied that the appellant "stole

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the money" without pointing out that the relevant considerations might be somewhat different on the different counts. True it is that the jury by its verdict distinguished between them, but the fact remains that it was not directed to consider what part of the evidence was properly of weight in deciding its verdict on the eighth count.

This leaves a final question to be determined, *viz.*, whether the error can be regarded as immaterial in view of the proviso to section 4 (1) of the Criminal Appeal Act, 1907, on the ground that no substantial miscarriage of justice has actually occurred. If it could be said that a reasonable jury after being properly directed would, on the evidence properly admissible, without doubt have convicted on the eighth count, the proviso should be applied. This is the test laid down by this House in STIRLAND *v.* DIRECTOR OF PUBLIC PROSECUTIONS (30 Cr.App.R. 40; [1944] A.C. 315). It is sufficient to say that, in the present instance, it would be going too far to make this assumption and the appeal must, therefore, be allowed. Section 44 (3) of the Criminal Justice Act, 1948, gives this House a discretion, when a criminal appeal is determined in favour of the accused, to direct payment out of local funds of costs to meet expenses incurred by him in the appeal to this House or in the prosecution of his appeal to the Court of Criminal Appeal. It is not the practice of the Court of Criminal Appeal to grant a successful appellant costs of an appeal to it save in exceptional circumstances, and, so far as that court is concerned, there is no special reason for disturbing that practice on the present occasion. But I think that the appellant should receive his taxed costs in respect of his appeal to this House. The section requires that this should be done by directing the proper payment out of local funds, but I understand that the Director of Public Prosecutions has already met, or agreed to meet, much of the appellant's expenses, and the effect of the House's order will, therefore, be to require local funds to bear only the balance, if any.

My Lords, my noble and learned friend, Lord Porter, who

is unable to be present today, authorises me to say that he agrees in all respects with this opinion.

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LORD OAKSEY: My Lords, I agree with the principles stated by the noble Viscount on the Woolsack as to the admissibility of evidence, but I find myself unable to agree with your Lordships' application of those principles to the facts of the case. I agree with your Lordships that the discretion of Pearson J. to try the eight counts together ought not to be disturbed. As I understand it, your Lordships are of opinion that the evidence on counts 1 to 7 was relevant on the eighth count, but so slightly relevant that it should have been excluded by the judge. I agree with the principle that the judge at the trial has a discretion to exclude evidence which, though strictly speaking admissible, is only slightly relevant and, if it relates to former offences by the appellant, may have a prejudicial effect out of proportion to its relevance, but I do not agree that that principle is applicable to the facts of this case and I am of opinion that the summing up of Pearson J. and the judgment of the Court of Criminal Appeal were right.

There is, in my opinion, no question of general importance in this appeal. The only question is: Do the facts which were proved as to the thefts referred to in counts 1 to 7 tend so slightly to implicate the accused in the crime in July on which he was charged in the eighth count that they ought to have been excluded? The facts on the eight occasions were, undoubtedly, similar. The premises were the same. The method of entry to the premises was the same. The money taken was less than the money on the premises. The appellant might have broken into the premises while on duty as a police constable when money was stolen, and when he was on leave no thefts took place. The only difference in the July facts was that the appellant was proved then to be close by the premises directly after the alarm was given in circumstances of suspicion. It is, in my opinion, important to observe that there was no direct evidence that the appellant broke in and committed the theft in July. The evidence, of course, was

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much more cogent than the evidence of May and June, but it was not conclusive and was really only a much stronger case of opportunity. It is true that the admission of the evidence of the facts of May and June involves the suggestion that the appellant committed crimes other than the particular crime on which *ex hypothesi* he was being tried, and, if the only relevance of the facts as to counts 1 to 7 was that he had committed crimes on those occasions, I should agree that evidence of such facts would be inadmissible. But that is not the only relevance of these facts. Their relevance consists and consists only, in my opinion, in the similarities which existed between the facts of May and June and the facts of July. It is one thing to prove that the appellant has committed a number of different crimes on different occasions; it may be a totally different thing to adduce evidence which tends to show that he has committed the same sort of offence in the same circumstances on several occasions. I do not understand your Lordships to hold that the evidence of what happened in July was inadmissible or should have been excluded on any of the counts 1 to 7 and, if that is so, it could, in my opinion, only be because of the same similarities in the evidence, from which it might be inferred that the accused stole the money on the first seven occasions although there was no direct evidence that he was, in fact, present when the money was stolen on any one of those occasions. The question may be tested in this way: Can it be said that no jury could reasonably find that one person committed all eight thefts? In my opinion, the same similarity must be equally relevant whether it is adduced on one count as on the others.

My Lords, I desire to add that I do not agree with the observations made by Lord du Parcq in stating the advice tendered to His Majesty in Council in NOOR MOHAMED *v.* R. ([1949] A.C. 182, at p. 194), in which he criticised the judgment of the Court of Criminal Appeal in SIMS (*supra*). I do not agree with that criticism, which was not in any way necessary to the decision of the NOOR MOHAMED CASE (*supra*). I see nothing wrong in approaching the question of what evidence

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is admissible by considering, first, the general rule as to admissibility and, secondly, what are the exceptions to it. No one doubts that evidence of previous or subsequent bad or criminal conduct on the part of the accused is to be excluded unless it is relevant to some issue in the case, but it is for the prosecution to prove the guilt of the accused, and the prosecution must, in proving facts which are more consistent than not with the guilt of the accused, negative "any defence which is open to the prisoner," to use the words of Lord Herschell L.C. in MAKIN'S CASE (*supra*). It is probably impossible to give an exhaustive definition of the kind of defences which may be open to a prisoner, or of the kind of bad or criminal conduct which may be relevant to the question of his guilt on the particular charge on which he is being tried. The issue to which the evidence in question was, in my opinion, relevant was whether the appellant was near the premises in July for an innocent purpose or not. For these reasons I agree with the judgment of the Court of Criminal Appeal.

LORD MORTON OF HENRYTON: My Lords, I agree with the speech which has been delivered by my noble and learned friend on the Woolsack. I desire only to add that, in my view, evidence as to the thefts which occurred on the first seven occasions was not admissible for the purpose of the trial of the appellant on the eighth count, because the appellant was not proved to have been near the shop or even in the market, at the time when these thefts occurred. It is, however, quite clear that the learned judge invited the jury to take that evidence into account when considering the eighth count. In making these observations, I do not regard myself as differing in any way from the speech with which I have just expressed my agreement. I make them only for the purpose of explaining why I cannot accept the views which have just been expressed by my noble and learned friend, Lord Oaksey.

LORD TUCKER: My Lords, for the reasons which have been stated by my noble and learned friend on the Woolsack I

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concur in the motion which he has proposed. I agree with my noble and learned friend, Lord Morton of Henryton, that the evidence with regard to the first seven occasions was irrelevant to the charge on the eighth count, but was left to the jury as relevant.

Appeal allowed.
Conviction quashed.

Solicitors: Sidney Torrance & Co., agents for J. Levi, Leeds, for the appellant.

BEFORE

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Sentence—Quarter Sessions—Probation Order Made by Recorder—Prisoner Rearrested on another Charge during Continuance of Sessions—Charge Dealt with by Recorder as Outstanding Offence—Sentence Varied to One of Imprisonment—Whether Conviction and Sentence Available for Sentence of Preventive Detention.

Preventive Detention—Previous Conviction Disputed by Prisoner—Trial of Issue Whether Prisoner Previously Convicted—No Right of Challenge—Criminal Justice Act, 1948 (11 & 12 *Geo.* 5, *c.* 58), *ss.* 21 (2), 23, 35 (1).

The appellant had, in 1949, been convicted by a magistrates' court and committed to quarter sessions for sentence under section 29 of the Criminal Justice Act, 1948, and had been placed by the recorder on probation. During the continuance of the sessions the appellant was rearrested on another charge and, at his request, was brought back before the recorder, who was asked to deal with the charge as an outstanding offence. He agreed to do so and altered his sentence to one of three years' imprisonment.

Held, that as a sentence can always be altered so long as the court is in session and until the document which is delivered to the gaoler as recording the sentences of the court is finally signed, there was no objection in law to the alteration of the

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sentence by the recorder in the manner above mentioned, and accordingly, the conviction and altered sentence became available as one of the three previous convictions on indictment and sentences of (inter alia) imprisonment, which under section 21 (2) (*b*) of the Criminal Justice Act, 1948, have to be proved as the foundation of a sentence of preventive detention; but the practice adopted was undesirable and ought not to be followed, and proper practice in such a case is to prefer a fresh charge in respect of the matter outstanding.

Inasmuch as the right of challenge of a juror is now regulated solely by section 35 of the Criminal Justice Act, 1948, and by subsection (1) of that section is limited to "a person arraigned on an indictment of any felony or misdemeanour," there is no right of challenge where a jury are empanelled to try the issue whether a prisoner has been previously convicted or sentenced as alleged in the statutory notice which, under section 23 of the Act, must be served as a condition precedent to a sentence of corrective training or preventive detention.

Appeal against conviction and sentence.

The appellant was convicted at Plymouth Quarter Sessions on January 14, 1952, of housebreaking and larceny and was sentenced by the recorder to eight years' preventive detention.

One of the convictions and sentences, set out in the statutory notice, which, under section 23 of the Criminal Justice Act, 1948, must be served as a condition precedent to a sentence of corrective training or preventive detention, was a conviction of larceny at Plymouth magistrates' court in 1949, and a sentence by the recorder of Plymouth, following a committal to quarter sessions for sentence under section 29 of the Act, of three years' imprisonment, one outstanding offence of larceny being taken into consideration. In respect of the offence for which the appellant was committed for sentence (larceny from a dwelling-house) the recorder originally made a probation order; but, during the continuance of the sessions, the appellant was re-arrested on a charge of stealing a substantial quantity of jewellery, and at his request brought back before the recorder, who was asked to take this further matter into consideration as an outstanding offence. He did so, and altered his sentence to one of three years' imprisonment.

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D. M. Scott, for the appellant:

No complaint is made of the severity of the sentence of preventive detention, but it is submitted that it should not be allowed to stand, because the requirements of sections 21 and 23 of the Criminal Justice Act, 1948, have not been followed. The prosecution sought to rely on the conviction and sentence before the recorder of Plymouth in 1949 as one of the three statutory convictions and sentences which had to be proved as a condition precedent to a sentence of preventive detention; but the proceedings were irregular, and the outstanding offence should not have been dealt with by the recorder, and the variation of his sentence was wrong. Further, when the jury were empanelled to try the issue whether the appellant had been previously convicted as the prosecution alleged, the appellant was never given any right of challenge and the trial of this issue was, accordingly, a nullity.

Dingle Foot, for the Crown.

THE LORD CHIEF JUSTICE [after stating that, in the opinion of the court, there was no ground for interfering with the conviction] continued: Then two other points are taken with regard to sentence. The sentence which the learned recorder passed was one of eight years' preventive detention, and considering that the appellant's character and record show that he had no fewer than 30 previous convictions, and was an habitual criminal, we can only say that it was a moderate sentence and, had an appeal been lodged on the ground of length, this court might have considered whether eight years was a sufficiently long period for which to protect the public against his depredations. However, we will pass from that, because Mr. Scott has not contended that the sentence is too long. What he has asked us to say is that the sentence could not be passed because the provisions of the Act of Parliament which authorised preventive detention had not been complied with. I may say here in passing that had the court felt obliged to give effect to the argument of Mr. Scott, the only thing they would have done would have been to alter the

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sentence from one of preventive detention to one of imprisonment for at least the same term, so that the appellant would have got no benefit by it and, far from benefiting, it would have been to his detriment, because the treatment of prisoners sentenced to preventive detention, at any rate after the first three years, is less rigorous than that of those sentenced to imprisonment. So that, by undergoing eight years' preventive detention the appellant gets an advantage he would not have got if he had been sentenced to eight years' imprisonment, which is the sentence we should have substituted.

In fact, the court does not give effect to the argument. The first point, and the more serious point, raised is this: The appellant was before Plymouth Quarter Sessions in 1949, having been convicted by a magistrates' court of the offence of stealing a pound note from a dwelling-house. He was committed under the provisions of section 29 of the Criminal Justice Act, 1948, to quarter sessions for sentence. When he appeared there the learned recorder, for reasons which no doubt seemed good to him then, but which perhaps it is a little difficult to understand in the case of a man with this record, said that he would make a probation order and give him a chance. The appellant agreed to enter into recognisances and was released, but on the next day, while the sessions were still in being, he was arrested on a much more serious charge of stealing £150 worth of jewellery. Then, while he was in custody, it was suggested, and he fell in with the suggestion, that he should be brought back to quarter sessions and ask the recorder to take into account the charge of stealing £150 worth of jewellery. Everyone knows now—at least, I hope they do—what is the effect of taking offences into account. It is a convention; it is not statutory. I have often thought it would have been a good thing if the matter had been dealt with by statute in the Criminal Justice Act, 1948, but it was not. It is simply a convention under which, if a court is informed that there are outstanding charges against a prisoner who is before it for a particular offence, the court can, if the prisoner admits the offences and asks that they should be taken into account, take

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them into account, which means that the court can give a longer sentence than it would if it were dealing with him only on the charge mentioned in the indictment. But, technically, taking offences into account does not amount to a conviction. That was decided in this court not very long ago where a man had been charged with an offence and found Guilty by a jury and then had asked for another offence to be taken into consideration, which was done. Then he appealed against the conviction for what I may call the main offence and this court set aside the conviction. Then the man was rearrested and charged with the offence which had been taken into consideration. In one case (McMINN (1945) 30 Cr.App.R. 138) a judge on circuit had held that the taking into consideration of an offence amounted to a conviction on which a plea of *autrefois convict* could be based. But an appeal to this court in another case (NICHOLSON (1948) 32 Cr.App.R. 98, 127) showed that that decision was wrong, and that the prisoner had never been convicted of the offence taken into consideration, and it was right that he should be tried for it, because, although the sentence for the original offence for which he had been tried was probably longer than it would have been had the offence not been taken into consideration, as that conviction was quashed, he had never been punished or tried for the offence which had been taken into consideration. Therefore, we said that it was quite proper to try him for the second offence which had been taken into consideration but had not been the subject of a charge.

Here what happened was that the appellant having been rearrested while the court was sitting, he was taken back there, and the recorder, being informed of the outstanding charge against him of stealing £150 worth of property, and apparently at the request of the appellant, dealt with it and set aside the probation order and sentenced him to three years' imprisonment. The court does not think that that was an altogether satisfactory method of dealing with the matter. They think it would have been better had the learned recorder said: "I have made the probation order. He is now in custody for this

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much more serious offence; he must be charged with that and he can be dealt with accordingly." But in fact, the recorder was asked by the appellant to take the offence into consideration and he did so and altered his sentence.

There is no doubt that a court always has the power to alter a sentence so long as the court is in session. That is to say, at assizes the judge who has passed a sentence may, at any subsequent date till the assizes are completed by the signing of the gaol delivery, alter the sentence, and does so not infrequently when he is actually signing the gaol delivery on the last day of the assizes. So, too, there cannot be any doubt that a court of quarter sessions has power to alter a sentence that it has passed. The sentence is not final and complete until the sentences are signed, which is usually done by the clerk of the peace and not by the recorder. Until the document, which is delivered to the gaoler as recording the sentences of the court, is finally signed, the sentence always can be altered—can be increased, which is seldom done, or can be decreased.

Therefore, there is no objection in law to the learned recorder having altered his sentence by revoking the probation order and passing a sentence of three years' imprisonment, although we do not think that is a procedure that should be followed in any subsequent case. If after a court has passed sentence there is found to be an outstanding charge, it is much better that that outstanding charge should be made the subject of a separate charge.

Accordingly, the court record shows that on October 17 and 18, 1949, the appellant was before Plymouth Quarter Sessions and there sentenced to three years' imprisonment. There was no attempt to question that sentence by *certiorari* or by appeal to the Court of Criminal Appeal; therefore it stands and must be taken as a legal sentence. It was decided by this court in BROWES, 33 Cr.App.R. 164; [1949] W.N. 343, that, for the purpose of considering whether a man is eligible for preventive detention or corrective training, any sentence which has been passed by a court of quarter sessions, following the procedure for committal to quarter sessions laid down by section 29, is to

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be treated as though it were a sentence following a conviction on indictment. Therefore, this sentence of three years' imprisonment passed in October, 1949, remains a sentence which can be treated as one of the three sentences which have to be proved to qualify for preventive detention.

The only other point raised was this: The appellant disputed this conviction and denied that he had been convicted, and raised this point with which I have dealt, as he was entitled to do. Thereupon the jury had to decide whether he had been previously convicted or not, and the same jury that had convicted him was still in the box. They were resworn to try the issue whether he had been previously convicted. It is contended that the appellant was not told of his right of challenge. In the opinion of the court he had no right of challenge. The right of challenge had never been given to a prisoner except on the trial of an indictment for felony until the Criminal Justice Act, 1948, which gave a right of challenge also in misdemeanour, and the right of challenge now is said to be statutory. There was a common law right of peremptory challenge, and there could be challenges for cause, which is different from a peremptory challenge. Challenge for cause is still preserved. If it can be shown that a particular juryman is biased or likely to be biased, the prisoner can demand to have that issue tried, and if the juryman is found to be biased or likely to be biased he is ordered to stand by. The section which now deals with the right of challenge, section 35 of the Criminal Justice Act, 1948, provides: "A person arraigned on an indictment for any felony or misdemeanour may challenge not more than seven jurors without cause and any juror or jurors for cause." Then it provides: "Upon the trial of any person for an offence on indictment, any challenge to jurors for cause shall be tried by the judge, chairman of quarter sessions, recorder or other person before whom the accused is to be tried." That is a change in the law because previously triers had to be appointed to try the question whether the juror was eligible. Then there is a provision: "Upon the trial of any person on indictment for felony or misdemeanour, the whole

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or any two or more of the jury may be sworn together." That again is a change in the law, because formerly in cases of felony every juror had to be sworn separately. Then subsection (4) provides: "Upon the trial of any person for an offence on indictment, the court may, if it thinks fit, at any time before the jury consider their verdict, permit them to separate." In fact, section 35 effects very wide changes in the law.

Therefore, applying the ordinary rules of construction, we now see that section 35 deals with this matter, and it is the only law that deals with the matter. The right of challenge is now enshrined in section 35. That section is confined to: "A person arraigned on an indictment for any felony or misdemeanour," and if the jury are trying the issue whether or not a prisoner has been previously convicted, they are not trying a felony or misdemeanour. They are trying a mere issue in the same way as if they were trying whether he was fit to plead or standing mute of malice or other matters of that sort, which are issues which arise in the case and are not charges of felony or misdemeanour which are being tried on indictment. Accordingly, the appellant had no right of challenge.

Our attention was called to TURNER, 3 Cr.App.R. 103, at p. 154; [1910] 1 K.B. 346, at p. 357, where the court, in considering whether a jury had been properly sworn, did say that there was no objection to swearing a jury to try whether a man was an habitual criminal in the form usually used in cases of felony. I observe that Channell J. did say that if the jury were sworn in the way juries were sworn for felony, the prisoner would have his challenges. He also went on to say that they need not be sworn in that way at all; they could be sworn for misdemeanour. That case was decided in 1910 and, as I have said, the law is now enshrined in section 35 of the Criminal Justice Act, 1948, and we have only to look there to see where the right of challenge is given.

For all these reasons, the appeal against conviction and sentence is dismissed.

Appeal dismissed.

BEFORE

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HAYDON WATTAM

Character of Prisoner—False Statements by Prisoner to Police—Explanation that he had been in Borstal and had been Stealing—Good Character not in Issue—Cross-examination on Character not Permissible—Criminal Evidence Act, 1898 (61 & 62 *Vict. c.* 36), *s.* 1 (*f*).

Evidence—Judges' Rules—Scope of Application.

Murder—Fresh Evidence Heard by Court—Conviction Quashed.

The appellant, who had told a number of lies to the police when questioned about his movements on the day of a murder, on his trial for murder, gave in evidence as his explanation of those lies that he had been in Borstal and had been stealing property in London.

Held, that the appellant had in no sense given evidence of good character, so as to entitle the prosecution to cross-examine him, under section 1 (*f*) of the Criminal Evidence Act, 1898, with a view to suggesting bad character.

Observations to the effect that the Judges' Rules are not rules of law, but only rules for the guidance of the police, and the evidence obtained in contravention of them is not necessarily inadmissible in law.

VOISIN (1918) 13 Cr.App.R. 89 followed.

Conviction of murder quashed after the reception of fresh evidence by the Court of Criminal Appeal.

Appeal against conviction.

The appellant was convicted at Hampshire Assizes on March 10, 1952, of murder and was sentenced by Pilcher J. to death. On November 19, 1951, between 10 a.m. and 12 noon, Mrs. Hands was murdered in her home by means of the belt of a raincoat which had been passed twice round her throat and knotted at the back. She was a widow with two daughters, one of whom, Mrs. Dix, with her husband, lived in her home, but

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on the morning of November 19 Mrs. Hands was alone in the house. The only means of tracing the murderer was that certain articles—a man's initialled toilet case and a watch—were stolen from the house, obviously by the murderer.

During the trial the appellant was cross-examined by counsel for the Crown on the possession of a pistol which, admittedly, had been purchased by him three days after the murder.

During the hearing of the appeal the court granted an application to call further evidence made on behalf of the appellant. This evidence was that of a police officer, who produced a statement made to the police by Ernest Stein, dealer in second-hand property, a witness for the prosecution, who at the trial had given evidence that, on the day of the murder, the appellant had brought to his shop an initialled toilet case which was afterwards proved to have been stolen from Mrs. Hands' home. The evidence now admitted was to the effect that Stein had first told the police a week after the murder that the appellant had brought the toilet case to his shop on that day; later Stein stated to the police that he had made a mistake and that the appellant had visited his shop on November 19, the day of the murder.

Norman Skelhorn (*A. S. Trapnell* with him) for the appellant:

The appellant was approached at his lodgings by several police officers and asked to accompany them to the police station. He was not told that he was free to refuse to go if he wished. This was equivalent to an arrest and answers subsequently obtained at the police station were inadmissible and should have been excluded.

[BYRNE J.: Is not the case of VOISIN [1918] 13 Cr.App.R. 89 in point?]

The cross-examination as to the pistol was inadmissible because the appellant had not given evidence of his good character but had merely given evidence of his bad character, *i.e.*, previous convictions, Army desertion, and escape from Borstal. The evidence could not be relevant to any other issue,

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as the pistol was acquired after the commission of the crime charged, and was irrelevant and prejudicial.

Ewen Montagu Q.C. (*A. Munro Kerr* with him) for the Crown:

The Judges' Rules are administrative and for the guidance of the police. They impose a discretion on the trial judge which, if properly exercised, cannot form a ground of appeal. This clearly appears from VOISIN (*supra*).

The cross-examination was relevant under the Criminal Evidence Act, 1898 and otherwise. From STIRLAND *v.* DIRECTOR OF PUBLIC PROSECUTIONS (30 Cr.App.R. 40, at p. 54; [1944] A.C. 315, at p. 327) it appears that character cannot be pegged at any particular level. A prisoner who says "I have been convicted once," when in fact he has been convicted 10 times, in effect says "My character is not so bad," and may be cross-examined to show that it is worse than he says. Where such cross-examination is admissible, it may be directed to events and offences after the crime charged: R. *v.* WOOD (1951) 35 Cr.App.R. 61. The cross-examination was, however, relevant on the facts of this case.

OLIVER J.: The case for the prosecution rested on three matters. First, certain articles stolen from Mrs. Hands' house were traced to the appellant. They were obviously taken by the murderer, whoever he was, and so far as is material for this case they consisted of a man's sort of compactum toilet case with gilt initials "A. D.," which were the initials of Mr. Dix, and a watch which belonged to Mr. Dix. The relevant evidence about this was given by Stein. The case was traced through Stein as having been exchanged on the morning of the murder for another article, a Kodak camera. He said that the appellant was the man who exchanged it. Next the prosecution relied on the identification of a man named Barrett, a chimney sweep, who was driving slowly past the house, in which he was interested for two reasons, first of all, because he was the family sweep, and secondly because there was some kind of notice at which he always looked. The third matter

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on which the prosecution relied is that in a number of matters obvious lies were told by the appellant to the police on the occasion of their first questioning of him on December 4. The defence said that the identification was extremely unsatisfactory, for the reason, among others, that out of six people, five of whom had had interviews with a man offering them the stolen property for sale, only two identified the appellant as that man; of the rest, three failed to identify him and one said that the appellant was clearly not the man. The question of identification was extremely difficult.

[His Lordship, considering the additional evidence called on behalf of the appellant, said that Stein had at first told the police that the compactum had been brought to him on that very day, a week after the murder, but no one who was not qualified for a lunatic asylum could mistake whether something had happened on the same day or a week before: Stein therefore could not have been telling the truth. Stein's evidence at the trial was supported by a document, but it was a fair view that he had drawn that document up himself to protect himself. The court could not say that that was the truth, but it was a matter which should have been put before the jury. The jury were allowed to treat Stein as an ordinarily honest witness.]

[His Lordship then referred to the manner in which the evidence of Barrett was dealt with in the summing-up, and continued:] The court does not think that was the correct direction. The jury should have been told: "It is for you to say on all this whether you are satisfied the man picked out by Barrett was the right man." The suggestion should not have been made and repeated to the jury, that if Barrett picked him out, he must have been right. In our opinion, any jury who so understood the direction given would not be to blame. In our view, that disposes of the value of both identifying witnesses and, as I suggested in argument, the two main legs having gone, only a most truncated case is left to the prosecution.

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With regard to the last leg, the answers made by the appellant to the police, those, in the opinion of the court, were most serious evidence against the appellant. On December 4 the police said to him: "We are investigating the murder of Mrs. Hands. She was murdered at such-and-such a time on such-and-such a date; we want to know where you were at that time on that date," and he first of all said: "I was staying with my mother in Brixton Road, London." The officer who was conducting the questioning said: "Ring up Brixton and find out if that is true," whereupon the appellant said: "You need not bother, it is not true," and, after a pause, "I was really staying at an hotel," the address of which he gave. After a little while he said that that was not true either, and then he said: "The fact is I was sleeping rough in a district of London I cannot describe on some coal." All those answers were untrue. In fact he had been sleeping the night before the murder in Southsea, quite a short distance from the murdered woman's house.

Obviously the matter for consideration in those answers was this: "You told three lies as to where you were, but they were all lies which placed you in London, a long way from the murder, whereas the truth is you were in Southsea, quite close." When that matter was put to him, he said that he told the lies because he did not want his thievings in London to be brought home—and it is an odd thing for a man to say he was in London when he did not want to be connected with thefts in London—"I had been staying at an hotel in Southsea. I had gone away without paying the bill, I had taken there some trifling articles and I did not want the police to trace the fact that I was a thief who had stolen those things or that I was a swindler who had gone off without paying." Those are matters of the greatest significance, but they will not suffice by themselves. There must be something more than the telling of lies to the police before a man is convicted of any crime, let alone murder. In our view, that is the only thing that is left, and Mr. Montagu plainly and frankly admitted that, if that was all the case he had, it was no case.

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. With regard to the admissibility of that evidence, which was argued by Mr. Skelhorn, the court is of opinion that there is nothing in that point at all. The argument was that the police took the appellant into custody, though they did not call it arrest, and then questioned him; and that, that being forbidden by the Judges' Rules, the evidence was inadmissible. There are several answers to that argument. First of all, in our view, the police had not taken the appellant into custody. The fact that they might have arrested him if he refused to answer their questions did not put him in custody. In our view of the evidence, the matter was really one for the discretion of the judge, and the judge thought that the appellant was not under restraint, and that his answers were made quite voluntarily. The police must investigate matters of this kind, or there would be no protection for anybody. We entirely agree with the learned judge and no more need be said. It was pointed out by Byrne J. yesterday in argument that in VOISIN (1918) 13 Cr.App.R. 89, where a man was in detention in a cell, he was asked: "How would you spell 'Bloody Belgian'?" and he replied "Bladie Belgiam," and as that was the way in which the murderer had spelt it, that formed a strong piece of evidence against him. It was considered by the Court of Criminal Appeal whether that question ought to have been asked, and it was pointed out by Lawrence J. in giving the judgment of the court (at p. 95): "Even if we disagreed with the mode in which the judge had in this case exercised his discretion, which we do not, we should not be entitled to overrule the decision on appeal. This would be evidence admissible in law, unless it could fairly be inferred from the other circumstances that it was not voluntary," and he then pointed out that the Judges' Rules are not rules of law, but intended only for guidance.

There is very little more I need add. In cross-examination there was suddenly produced to the appellant what is sometimes called a toy pistol, which is, in fact, according to the document supplied with it, a German-made starting pistol which fires blank cartridges. It seems to us that its usefulness

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in this case ends with the fact that it was not bought till three days after the woman was murdered. Accordingly, what it had to do with the case we have not been able to appreciate, in spite of the argument addressed to us by Mr. Montagu, and what legitimate place it had in the case unless it was to introduce the appellant's character, I do not know. Had he put his character in issue in the sense demanded by the Criminal Evidence Act, 1898, its introduction would have been legitimate, though perhaps a little hard, but, in the opinion of the court, he had not put his character in issue. He had not given evidence that he was a man of good character. All he had said was: "I have been in Borstal. I am a thief and I have been stealing things in London. That is why I made certain answers to the police." That is not, in our view, giving evidence of good character, nor do we agree in the argument of Mr. Montagu that the position is to be compared with that of the man who says in the witness-box: "I have once been convicted of crime," when in fact he has been convicted half a dozen times. A prisoner who says that is, of course, liable to be asked in cross-examination: "It is not true that you have only been convicted once. Have you not been convicted six times?" because he is giving evidence of a form of good character and is saying untruly: "My character is better than it truly is." He lays himself open under the Act to cross-examination about anything which tends to show that he is a man of bad character. In this case we do not think that the buying of the pistol after the murder could be relevant to anything except character and that, as he had not put his character in issue, the appellant was not liable to be asked those questions.

We have come to the conclusion that the verdict was unreasonable on the facts as we now know them, and cannot be supported, having regard to the evidence. Furthermore, there was sufficient misdirection to invalidate the conviction. Accordingly, the appeal will be allowed and the conviction quashed.

Conviction quashed.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE OLIVER, MR. JUSTICE BYRNE, MR. JUSTICE ORMEROD AND MR. JUSTICE PARKER

JOHN IRVINE MITCHELL

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Evidence—Corroboration—Child Giving Sworn Evidence—Child an Accuser in Relation to Offence Not Charged—Summing-up—Misdirection in Law—Proviso Applied—Criminal Appeal Act, 1907 (7 *Edw.* 7, *c.* 23), *s.* 4 (1).

Where any child, in the course of a trial, gives evidence on oath alleging that it has been sexually tampered with, whether the offence to which the child deposes is one charged in the indictment or not, the summing-up should warn the jury of the danger of accepting the child's evidence in the absence of corroboration.

Proviso to section 4 (1) of the Criminal Appeal Act, 1907, applied and conviction affirmed, despite a misdirection in law on corroboration, in a case of indecent assault on a child where there was, in fact, corroboration of the child's evidence.

GREGG (1933) 24 Cr.App.R. 13, followed.

Appeal against conviction.

The appellant was convicted at West Ham Quarter Sessions on January 11, 1952, on three charges of indecent assault on a girl aged 11 and was sentenced by the recorder to nine months' imprisonment.

The child, Sheila Pauline Golder, gave evidence on oath that on three occasions the appellant had indecently assaulted her in the vestry of a church of which he was the clergyman. She said that on the first occasion he had spoken to her about a girl named Judy who lived in Cornwall, and who, he said, used to go about with boys and behave indecently with them, and that he had described indecencies which took place between him and Judy. Judith Ann New (known as "Judy"), who also was aged 11 and gave evidence on oath, said that she had

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known the appellant in Cornwall some two years before and had for a time stayed in the house occupied by the appellant and his wife. She alleged that on occasions the appellant had behaved indecently to her in her bedroom and asked her to do other indecent things with him, which she had refused to do. The appellant gave evidence that Judy had behaved indecently with other children, including his own boy, but denied that he had spoken about this to Sheila Golder, though he was unable to suggest how Sheila could have learnt about Judy without being told by him. The appellant's wife also gave evidence and said that she had seen Judy behaving indecently with her own boy.

The recorder warned the jury of the danger of acting on the evidence of Sheila Golder in the absence of corroboration, but told them that her evidence was corroborated by the uncorroborated evidence of Judy. He did not warn the jury of the danger of accepting Judy's evidence in the absence of corroboration.

James Burge for the appellant:

The recorder misdirected the jury in saying that the evidence of Sheila Golder could in law be corroborated by that of Judy. Judy was a young child giving evidence of indecent conduct towards herself, and in practice, therefore, her evidence required corroboration, and the jury should have been warned of the danger of acting on her evidence without corroboration. The fact that there may have been other evidence which the jury were entitled to regard as corroborating that of Sheila Golder should not be regarded as a ground entitling the court to apply the proviso to section 4 (1) of the Criminal Appeal Act, 1907, in face of the plain misdirection on a vital issue in the case.

Frank Milton for the Crown:

The child Judy was not giving evidence with regard to any offence charged in the indictment, and her position with regard to the need for corroboration was, therefore, somewhat different from that of Sheila Golder, with regard to whom the recorder

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gave a clear warning on the danger of acting without corroboration. Even, however, if the recorder was wrong in the manner in which he dealt with Judy's evidence, there was clearly evidence on which the jury were entitled to rely as corroborating the evidence of Sheila Golder, namely, the appellant's own evidence with regard to his association with Judy and her conduct, and the court is invited to apply the proviso to section 4 of the Criminal Appeal Act, 1907, as was done in the case of GREGG (1933) 24 Cr.App.R. 13, where there was a misdirection on corroboration, but ample corroboration in fact existed.

James Burge replied.

At the conclusion of the arguments the Lord Chief Justice said that the appeal would be dismissed and that the court would give its reasons at a later date.

May 12.—The following judgment was read by:—

THE LORD CHIEF JUSTICE: The judgment of the court has been prepared by Oliver J.

This was an appeal by John Irvine Mitchell against a conviction before the recorder of West Ham of indecent assault upon the same girl, Sheila Pauline Golder, who was 11 years old, on three different occasions. There is no difference in law between the cases and they can be dealt with as one charge. At the end of the argument the court announced that the appeal was dismissed, and now give the reasons for their decision.

The appellant, who is a clergyman, was sentenced to nine months' imprisonment, against which sentence he does not appeal. His grounds are set out in the notice: (1) that the recorder wrongly admitted the evidence of Judith Ann New, a child of 11; (2) that the recorder failed sufficiently to direct the jury that the evidence of the girl Sheila required corroboration and misdirected the jury that the evidence of Judith could in law afford such corroboration; (3) that the recorder

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failed to point out to the jury that the evidence of Judy, as she was called, required corroboration.

Ground 1 and the first part of ground 2 were not relied upon by Mr. Burge on behalf of the appellant, but he took the point that not only did the recorder fail to point out to the jury that the evidence of Judy itself required corroboration, but went on to say that Judy's evidence (which was itself, in fact, uncorroborated) did corroborate that of Sheila.

Sheila's story was this, that she had been on three occasions interviewed by the appellant in the vestry of his church and that he had on the first occasion, after talking about school, started talking about a girl Judy who lived in Cornwall, that Judy used to go about with boys and allow them to be rude with her, then that he, the appellant, used to be rude to Judy and described a form of indecent assault. Now in fact there was living in a village in Cornwall a girl named Judy who had known the appellant some two years before and had, for a time, lived as a guest in his home along with him and his wife. She alleged that in her bedroom, sitting on her bed, he used to do indecent things to himself and to ask her to do indecent things with him, but that she refused. It was quite out of the question that Sheila, living in West Ham, could ever have come in contact with or heard of Judy living in Cornwall except by communication with the appellant. As was conceded, the recorder dealt properly with corroboration in the case of Sheila, but he failed to warn the jury of the danger of accepting the evidence of Judy in the absence of corroboration. Indeed, he told them in terms that her uncorroborated evidence itself corroborated the evidence of Sheila.

Cases on corroboration of the evidence of children who are sworn—and we are not here dealing with cases of the unsworn evidence of children—are very numerous and by no means easy to reconcile. Two questions at least emerge from the cases. One is, in the case of the evidence of a child of tender years should the jury always be warned of the danger of accepting such evidence in the absence of corroboration? The other question is whether the warning is only necessary where the

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child is an accuser, that is, not necessarily the accuser in the charge but a child who is alleging an offence in relation to itself or, as it is sometimes said, a child who has been tampered with.

All the cases appear to agree that a child in the latter class does need corroboration and it is clear that Judy was a child in that class. It is sufficient for this purpose to refer to the cases of BAILEY, 18 Cr.App.R. 42; [1924] 2 K.B. 300; BERRY (1924) 18 Cr.App.R. 65; KILLICK (1924) 18 Cr.App.R. 120; MARSHALL (1924) 18 Cr.App.R. 164; DENT (1943) 29 Cr.App.R. 120, and HATTON, 19 Cr.App.R. 29; [1925] 2 K.B. 322.

It is unnecessary, for the purpose of this appeal, to consider the first and wider question. No doubt the jury observed the coincidence that Judy in Cornwall confirmed the story of Sheila in London with regard to her conversation with the appellant, but that, of course, went only to the weight of Judy's evidence and did not excuse the omission to give a warning of the danger of accepting her evidence, uncorroborated as it was. But quite apart from Judy's evidence there was in fact corroboration of part of Sheila's evidence implicating the accused, although it was never in terms pointed out to the jury. Part of her allegation, as will be seen above, was that one of the things the appellant said to the child was that Judy used to go about with boys and allow them to be rude to her. This matter is well expressed by the recorder at p. 27F, where he said: " Was this a perfectly innocent and, indeed, kindly interview between the man, anxious to do all he could for this little girl merely in a fatherly sort of way and telling her about another girl he had fathered, who used to run to him when he went to fetch her from school, and who took her into his house, and so forth, or was this a conversation about something sexual—the sort of conversation that might prepare a child's mind for the sort of thing that Sheila says followed that conversation? " Although, as has been pointed out, that was not said with reference to the remark about Judy and the boys, it is nevertheless quite appropriate to the evidence on that subject. Now in his evidence at p. 41 of the transcript the appellant said, with

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reference to Judy, that she had behaved dirtily with other children, including his own boy, and could not suggest how Sheila could know that without being told by him. At p. 53 his wife described having witnessed such conduct between the two children. In the opinion of the court these passages constitute ample corroboration of a part of Sheila's evidence which implicates the accused. No man, let alone a clergyman, could justify telling such things to a child, nor could they be told with any object but one. GREGG (1933) 24 Cr.App.R. 13, is authority for the proposition that non-direction as to corroboration would not necessarily matter provided there was in fact corroboration as here. Further, with regard to the misdirection that Judy's evidence corroborated that of Sheila, it is open to the court to apply the proviso to section 4 of the Criminal Appeal Act within the limits laid down in STIRLAND *v.* DIRECTOR OF PUBLIC PROSECUTIONS in the House of Lords, 30 Cr.App.R. 40; [1944] A.C. 315. In the view of the court this is eminently a proper case for the proviso to be applied and, applying it accordingly, the court dismisses this appeal.

Appeal dismissed.

Solicitors : Duthie, Hart & Duthie, for the appellant; Solicitor for Metropolitan Police, for the Crown.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE JONES AND MR. JUSTICE PARKER

FRANCIS WILFRED WINDLE

1952
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Insanity—"M'Naghten Rules"—Defence that Prisoner did not Know that he was Doing what was Wrong—Meaning of "Wrong"—Rules Applicable to all Forms of Insanity.

Where a defence of insanity is raised, and it is contended on behalf of the prisoner that owing to a defect of reason due to disease of the mind he did not know that he was doing what was wrong, it must be established that he did not know that he was doing what was contrary to law, and it is not sufficient to prove that, though he knew that what he was doing was legally wrong, he believed that it was morally right.

The Rules in M'NAGHTEN'S CASE (1843) 10 Cl. & F. 200; 4 St.Tr.(N.S.) 847, apply to every form of insanity, and are not limited to insanity arising from delusions.

Appeal against conviction.

The appellant was convicted at Birmingham Assizes on April 8, 1952, of murder and was sentenced by Devlin J. to death.

The appellant had killed his wife by administering to her 100 aspirin tablets. At the trial the only defence raised was that of insanity. One doctor was called on behalf of the defence and the prison doctor was called by the prosecution in rebuttal, but Devlin J. ruled that there was no evidence of insanity to be left to the jury.

Christopher Shawcross, Q.C. (*A. de Piro* with him), for the appellant:

The so-called M'Naghten Rules, as appears from the opinion of Tindal C.J. in giving the considered views of all the judges to

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the House of Lords and from the wording of the rules themselves, apply strictly only to cases of delusional insanity and not to a case such as this where there was no question of delusions. In any event Devlin J. misconstrued the rules and, in particular, misconstrued the meaning of "wrong" in the answers to the second and third questions. Wrong means morally wrong, that is wrong according to the ordinary accepted standards of reasonable men—see *per* Lord Reading C.J. in CODÈRE (1916) 12 Cr.App.R. 21, at p. 27. One test is, was the prisoner capable of forming a rational judgment between right and wrong? Wrong cannot and does not mean simply illegal or contrary to law. Everyone, sane or insane, is presumed to know the law and mere knowledge or otherwise of the illegality of the act is irrelevant except as a guide as to whether or not the prisoner knew he was doing what was morally wrong. The true test is responsibility—RIVETT (1950) 34 Cr.App.R. 87. In HADFIELD (1800) 27 St.Tr. 1281, in particular, and in PATE (1850) 8 St.Tr.(N.S.) 1; SMITH (OLIVER) (1910) 6 Cr.App.R. 19; LAYTON (1849) 4 Cox 149, the prisoner certainly knew the act was illegal but was nevertheless found insane, or at any rate the issue of insanity was still left to the jury. Prisoners who give themselves up to the police know the act was illegal but yet may be found insane and irresponsible in law. The special verdict of Guilty but insane under the Trial of Lunatics Act, 1883, is an acquittal: before that Act the verdict was Not Guilty on the ground of insanity; the insane prisoner is not guilty because the necessary intention or *mens rea* is absent. The M'Naghten Rules have never been extended, restricted or relaxed.

If there is evidence of disease of the mind—in this case there was abundant evidence that the prisoner suffered from folie à deux, insanity communicated to him from his insane wife—then it is always a question for the jury to decide whether or not the prisoner was responsible for his act according to law. There being admittedly evidence of disease of the mind, Devlin J. was wrong in withdrawing the issue of insanity from

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the jury simply because the prisoner knew what he was doing was illegal. There was evidence of insanity within the meaning of the M'Naghten Rules because the prisoner did not know what he was doing was morally wrong and indeed thought or believed that any ordinary man would think his act right.

The jury can always infer insanity from the appearance of the prisoner in the dock and his conduct. Medical evidence is unnecessary—DART (1878) 14 Cox 143; RIVETT (*supra*). The issue of insanity should always be left to the jury, at any rate in cases where there is evidence of disease of the mind. The Crown never suggested that there was no evidence of insanity and indeed obtained leave to call evidence in rebuttal: both counsel for the Crown and Devlin J., at that stage at any rate, thought that there was prima facie evidence of insanity raised by the defence. Thereafter Devlin J. was wrong in withdrawing this issue, or at any rate wrongly exercised his discretion.

A. P. Marshall, Q.C. and *E. Daly Lewis*, for the Crown, were not called on.

THE LORD CHIEF JUSTICE: The appellant was convicted before Devlin J. at Birmingham Assizes of the murder of his wife. He is a man of little resolution and weak character who was married to a woman 18 years older than himself. His married life was very unhappy. His wife, in the opinion of the doctors, though they never saw her, must have been certifiable, and was always talking about committing suicide. The appellant became obsessed with this and discussed it with his workmates until they were tired of hearing him, and on one occasion, just before this crime was committed, one of them said, "Give her a dozen aspirins." On the day of the crime the appellant seems to have given the woman a hundred aspirin tablets, which was a fatal dose. Later, he told the police that he supposed he would be hanged for it.

The defence at the trial was that he was insane and that the jury should return a special verdict to that effect, but Devlin J.

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ruled that there was no issue of insanity to be left to the jury. There was some evidence that the appellant suffered from some defect of reason due to disease of the mind. The one doctor called for the defence said it was a form of communicated insanity known as folie à deux, which arises when a person is in constant attendance on a person of unsound mind and, in some way or other, the insanity gets communicated to the attendant.

The point we have to decide can be put into a very small compass. We are asked to review—I am not sure we are not asked to make new law—what are known as the M'Naghten Rules which in 1843 the judges agreed were the proper tests to be applied in considering the defence of insanity. All the judges, except Maule J., who differed on small points, gave, through the mouth of Tindal C.J., these answers to questions put by the House of Lords ((1843) 10 Cl. & F. 200, at p. 210; 4 St.Tr.(N.S.) 847, at p. 931) :—

> " That the jury ought to be told in all cases that every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that, to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong."

The argument in this appeal really has been concerned with what is meant by the word " wrong." The evidence that was given on the issue of insanity was that of the doctor called by the appellant and that of the prison doctor who was called by the prosecution. Both doctors expressed without hesitation the view that when the appellant was administering this poison to his wife he knew that he was doing an act which the law forbade. I need not put it higher than that. It may well be

that, in the misery in which he had been living with this nagging and tiresome wife who constantly expressed the desire to commit suicide, he thought she was better out of the world than in it. He may have thought it was a kindly act to put her out of her sufferings or imagined sufferings, but the law does not permit such an act as that. There was some exceedingly vague evidence that the appellant was suffering from a defect of reason owing to this communicated insanity, and, if the only question in the case had been whether the appellant was suffering from a disease of the mind, that question must have been left to the jury because there was some evidence of it, but that was not the question. The question, as I endeavoured to point out in giving judgment in RIVETT (1950) 34 Cr.App.R. 87, in all these cases is one of responsibility. A man may be suffering from a defect of reason, but, if he knows that what he is doing is wrong—and by "wrong" is meant contrary to law—he is responsible. Counsel for the appellant, in his very careful argument, suggested that the word "wrong" as it is used in the M'Naghten Rules did not mean contrary to law, but had some qualified meaning, that is to say, morally wrong, and that, if a person was in a state of mind through a defect of reason that he thought that what he was doing, although he knew it was wrong in law, was really beneficial, or kind, or praiseworthy, that would excuse him.

Courts of law, however, can only distinguish between that which is in accordance with law and that which is contrary to law. There are many acts which we all know, to use an expression to be found in some of the old cases, are contrary to the law of God and man. In the Decalogue, are the commandments "Thou shalt not kill" and "Thou shalt not steal." Such acts are contrary to the law of man and they are contrary to the law of God. In regard to the Seventh Commandment, "Thou shalt not commit adultery" it will be found that, so far as the criminal law is concerned, though that act is contrary to the law of God, it is not contrary to the law

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of man. That does not mean that the law encourages adultery: I only say it is not a criminal offence.

The test must be whether an act is contrary to law. In RIVETT (*supra*) I referred to the Trial of Lunatics Act, 1883, section 2 (1) of which provides:—

> "Where in any indictment or information any act or omission is charged against any person as an offence, and it is given in evidence on the trial of such person for that offence that he was insane, so as not to be responsible, according to law, for his actions at the time when the act was done or omission made, then, if it appears to the jury before whom such person is tried that he did the act or made the omission charged, but was insane as aforesaid at the time when he did or made the same, the jury shall return a special verdict. . . ."

I emphasise again that the test is responsibility "according to law."

I am reminded by Parker J. that counsel for the appellant argued that the M'Naghten Rules only applied to delusions. This court cannot agree with that. It is true that when the judges were summoned by their Lordships the occasion had special reference to M'NAGHTEN'S CASE (*supra*) but the M'Naghten Rules have ever since that date been generally applied to all cases of insanity, whatever the nature of the insanity or disease of the mind from which the offender is suffering.

In the opinion of the court, there is no doubt that the word "wrong" in the M'Naghten Rules means contrary to law and does not have some vague meaning which may vary according to the opinion of different persons whether a particular act might not be justified. There seems to have been no doubt in this case that it could not be challenged that the appellant knew that what he was doing was contrary to law. In those circumstances what evidence was there that could be left to the jury to suggest that he was entitled to a verdict of Guilty but insane—*i.e.*, insane at the time of the act complained of?

Devlin J. was right to withdraw the case from the jury. This appeal fails.

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Appeal dismissed.

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Solicitor: A. H. Evans, Birmingham, for the appellant.

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BEFORE

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REGINALD GEORGE MAY

1952
May 13

Evidence—Judges' Rules—Alleged Questioning of Prisoner in Custody—Article to be Exhibit in Case Shown to Prisoner.

A police officer, who was following the appellant and another person, saw the appellant drop a white object which proved to be a jemmy wrapped in newspaper. After the appellant had been taken into custody and searched, a small corner piece of newspaper was discovered in his pocket, which was found to fit exactly into the piece of newspaper in which the jemmy had been wrapped. The police officer, having cautioned the appellant and produced to him the jemmy and the newspaper wrapping, said to him: "I saw you throw this jemmy away, which was wrapped in this newspaper, and, as you have seen, the piece of paper from your pocket fits it exactly." The appellant replied: "Well, what a ——! Nicked for a bit of paper! You've done me right now. I'd have got away with it but for that." It was contended on behalf of the appellant that the appellant's statement was inadmissible in evidence, on the ground that it had been obtained as a result of cross-examination of him by a police officer when he was in custody in contravention of the Judges' Rules.

Held, that there had been no cross-examination of the appellant after he was in custody, and it was perfectly proper for the police officer to show to him an object which was going to be an exhibit in the case.

Observations on the Judges' Rules not being rules of law, but rules of practice laid down for the guidance of the police.

Appeal against conviction.

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The appellant was convicted at the County of London Sessions on February 28, 1952, of attempted office-breaking and sentenced by the Deputy-Chairman to two years' imprisonment.

The appellant was tried together with a man named Smithers. One of several police officers who were following them saw the appellant drop a white object, which proved to be a jemmy wrapped in newspaper. After the appellant and his companion had been taken into custody, the appellant was searched, and in his pocket was discovered a small corner piece of newspaper, which was found to fit exactly into the piece of newspaper in which the jemmy had been wrapped. The police officer, having cautioned the appellant and produced to him the jemmy and its newspaper wrapping, said, "I saw you throw this jemmy away, May, which was wrapped in this newspaper and, as you have now seen, the piece of paper from your pocket fits it exactly." The appellant replied: "Well, what a ——! Nicked for a bit of paper! You've done me right now! I'd have got away with it but for that."

Eric Myers, for the appellant:

The answer by the appellant to the police officer was inadmissible in evidence, as it was obtained as the result of cross-examination of the appellant by the officer after he was in custody. This was a contravention of rule 3 of the Judges' Rules.

W. G. Fordham, for the Crown, was not called on.

THE LORD CHIEF JUSTICE: The appellant was convicted at London Sessions of attempted office-breaking and sentenced to two years' imprisonment. He appeals to this court against conviction.

The short point that is taken for the appellant is this: the prisoners—the appellant was tried with another man named Smithers—had been arrested because police officers were prepared to swear to their identity. While the police officers were following the prisoners, one of the officers saw the appellant drop a white object. The white object was in fact a

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house-breaking instrument, namely a jemmy, and it was wrapped in a piece of newspaper. After the prisoners were taken into custody at the police station, the appellant was searched and in his pocket was a small corner piece of newspaper which was then found to fit exactly into the piece of newspaper in which the jemmy had been wrapped, showing, therefore, that the jemmy had been in his possession. The police officer, having cautioned him, said: "I saw you throw this jemmy away, May, which was wrapped in this newspaper, and, as you have now seen, that piece of paper from your pocket fits it exactly." The appellant answered: "Well, what a ——"—something or other expressing surprise, disgust or resentment—"Nicked for a bit of paper! You've done me right now! I'd have got away with it but for that." It is said that that evidence ought not to have been admitted because it was cross-examination of a prisoner after he was in custody.

The court cannot see that this is a case of cross-examination of a prisoner after he was in custody. It may be a very proper thing for a police officer to show a prisoner what is going to be an exhibit in the case and say, "There you are." If the appellant had been found with the jemmy on him, there would have been no need to show it to him except that it would have been put on the table when he was being charged.

The test of the admissibility of a statement is whether it is a voluntary statement. There are certain rules known as the Judges' Rules which are not rules of law but rules of practice drawn up for the guidance of police officers; and if a statement has been made in circumstances not in accordance with the Rules, in law that statement is not made inadmissible if it is a voluntary statement, although in its discretion the court can always refuse to admit it if the court thinks there has been a breach of the Rules.

In this case there does not appear to this court to have been anything in the nature of cross-examination. The appellant being in custody, the officer cautioned him before he said

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anything to him and, in spite of that caution, the appellant made that statement. In any event, the evidence was so overwhelming that there could be no possibility of the court not applying the proviso. In our opinion, there was no improper admission of evidence and therefore this appeal fails.

Appeal dismissed.

Solicitor: Solicitor for Metropolitan Police, for the Crown.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE JONES AND MR. JUSTICE PARKER

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REINHARDT HUDSON
MICHAEL THOMAS HAGAN

Indictment—Misjoinder—Unnecessary Length—Prosecution to be Put to Election—Indictments Act, 1915 (*5 & 6 Geo. 5, c. 90*), *Sched. I, r. 3.*

In an indictment containing counts for breaking and entering it is not proper to include a count for malicious damage, where the damage has not been caused in the course of any breaking and entering.

Observations on an unduly large number of counts being included in one indictment, and on the propriety of the prosecution being put to their election, where an indictment contains a large number of counts, so that only a limited number of counts are tried together.

Appeals against conviction.

The appellants were convicted at Durham County Quarter Sessions on February 28, 1952, of office-breaking and larceny and were each sentenced by the Chairman to four years' imprisonment. The appellant Hagan was also convicted of malicious damage, for which he received a concurrent sentence of 12 months' imprisonment and both appellants were also

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convicted of killing a sheep with intent to steal, for which they received concurrent sentences of 12 months' imprisonment.

The indictment contained in all 33 counts, most of which related to breaking and entering and larceny, with an alternative count for receiving in each case. The appellant Hagan was charged also on two counts alleging malicious damage unconnected with any breaking or entering and both appellants were charged on one count with killing a sheep with intent to steal. Three other prisoners also were charged, two of whom pleaded Guilty and one of whom was acquitted. No application was made to the Chairman for separate trials of any of the counts.

K. P. Chitty, for the appellant Hudson.
J. R. Johnson, for the appellant Hagan.
Henry Elam, for the Crown.

THE LORD CHIEF JUSTICE: These two appellants, along with three other men, one of whom was acquitted and two of whom pleaded Guilty, were indicted at the Quarter Sessions for the County of Durham on an indictment that contained 33 counts. It is true that a certain number of those counts were alternative, a charge of stealing being preferred in one count and in the next count a charge of receiving the same goods knowing them to have been stolen. That left the jury to decide whether they would convict of stealing or receiving, because they could not convict of both.

The court has on many occasions pointed out how undesirable it is that a large number of counts should be contained in one indictment. Where prisoners are on trial and have a variety of offences alleged against them, the prosecution ought to be put on their election and compelled to proceed on a certain number only. Quite a reasonable number of counts can be proceeded on, say, three, four, five or six, and then, if there is no conviction on any of those, counsel for the prosecution can consider whether he will proceed with any other counts in the indictment. If there is a conviction, the other counts

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can remain on the file and need not necessarily be dealt with unless this court should for any reason quash the conviction and order the others to be tried. But it is undesirable that as many counts as were tried together in this case should be tried together, though the court desires to say that, in its opinion, the Chairman dealt with the case admirably. It was a pity an application was not made to him for separate trials, or perhaps if he had had a longer experience as Chairman he might have said at once that he would not try all these counts together. Certainly judges have tried a large number of counts together, and so have Quarter Sessions, but it is not a thing to be encouraged and I hope it will not happen again that as many counts as were tried together in this case will be tried at the same time. It is quite possible to split the indictment up and put some counts in another indictment. It may increase the costs to some small amount, but any small increase of that sort is nothing compared with the danger there may be of not having a fair trial.

In this case the court is clearly of opinion that there was a misjoinder of those counts which alleged malicious damage against one of the appellants, and in that connection it is as well to remember the words of rule 3 of the rules contained in Sched. I to the Indictments Act, 1915, which provides: "Charges for any offences, whether felonies or misdemeanours, may be joined in the same indictment if those charges are founded on the same facts, or form or are a part of a series of offences of the same or a similar character."

There is no doubt that the case presented by the Crown in this case was that the two appellants had, to use the language of police officers after verdict, been terrorising the countryside by their depredations. There was no objection at all to including in the same indictment all the breakings and enterings and larcenies they were alleged to have committed, but there could be no ground for joining in this indictment the two charges of malicious damage with which one of the appellants was charged. I do not emphasise this because he

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alone was charged, for it was not, in our opinion, a right joinder in any case inasmuch as each offence of malicious damage was an offence of throwing a brick through a plate glass window. It was not done necessarily in the course of a breaking or entering or with the object of breaking and entering; it was just a senseless piece of damage. Those charges ought to have been put into a separate indictment and the court proposes to quash the convictions on those two counts because in their opinion they ought never to have been included in the indictment. The other count about which the court has more doubt was that which charged the killing of a sheep with intent to steal. There again it is certainly open to question whether that count could be included in the indictment. At the same time there was no application to treat it separately and there was this nexus about it, that some of the witnesses who were giving evidence on that count were the same as those giving evidence on the other counts. The court does not in all the circumstances see fit to quash the conviction on that count. We think that it is perfectly clear that no injustice was done to these appellants by the length of the indictment in this particular case or by the way in which the case was conducted at the trial. That does not mean to say that we think that these matters were desirable, but we do not find any ground for quashing the conviction.

[The learned Lord Chief Justice then referred to the summing-up and continued:] We cannot find any reason for interfering with the direction of the Chairman, which we think on the whole was full and satisfactory. We find no ground for setting aside any of the convictions on any of the counts with the exception of the convictions of malicious damage. That will not make any difference to the sentences because although sentences of 12 months' imprisonment were passed for the counts charging malicious damage, those sentences were concurrent with sentences of four years' imprisonment passed on the more serious counts. The appeals are dismissed.

Appeals dismissed.

COURTS-MARTIAL APPEAL COURT

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HILBERY AND MR. JUSTICE DEVLIN

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May 26

TOM HOUGHTON

Practice—Appeal Against Conviction Involving Sentence of Death—Application to be Treated as Hearing—Presence of Applicant or Appellant—One Judgment Only to be Delivered.

The Courts-Martial Appeal Court will generally adopt the usual practice of the Court of Criminal Appeal in capital cases, and treat the application for leave to appeal as the hearing of the appeal in the case of any application for leave to appeal against conviction involving sentence of death, where such sentence stands after confirmation by the convening officer.

The court will not exercise its power under section 11 of the Courts-Martial (Appeal) Act, 1951, of giving leave to an applicant or appellant to be present during the hearing, unless it is satisfied that his presence is necessary in the interests of justice.

As a general rule, the normal practice of the Court of Criminal Appeal will be followed and one judgment only will be delivered.

Application for leave to appeal against conviction.

The appellant, Private (Acting-Corporal) Tom Houghton, R.A.S.C., was convicted by court-martial held in Egypt on May 1, 1952, under section 41 of the Army Act, of the murder of Captain Herbert Mason on February 9, 1952, at Fayid, Egypt, and sentenced to death.

Paul Sandlands, Q.C., and *W. Percy Grieve*, for the appellant.

The Solicitor-General (*Sir Reginald Manningham-Buller*, Q.C.), and *Maxwell Turner*, for the Army Council.

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Counsel for the appellant contended that there had been a miscarriage of justice and that the proper verdict should have been Guilty but Insane. They asked that leave should be given under section 11 of the Courts-Martial (Appeals) Act, 1951, for the appellant to be present at the hearing so that he might be seen by a Home Office alienist.

THE LORD CHIEF JUSTICE: The appellant was convicted by a court-martial held in Egypt of the murder of Captain Mason, an officer who had just arrived in Egypt to take over command of the appellant's company. The defence at the trial was insanity and this court is now being asked to say that the appellant should be given leave to appeal, brought over to this country and examined in order to see whether he is sane or not.

I mentioned a few moments ago at the sitting of the court that the usual practice of the Court of Criminal Appeal would be adopted by the Courts-Martial Appeal Court in this respect, that in capital cases the application for leave to appeal would be treated as the hearing of the appeal. There may be cases in which that cannot be done, but as a general rule that will be done, because it is undesirable that matters which involve the capital sentence should be left in suspense for any length of time. Therefore, where there is an application for leave to appeal in a case involving the capital sentence—which, of course, may arise in courts-martial in more cases than that of murder—this court will generally deal with the case as though it were an appeal. There is this difference in regard to capital cases: the time for appealing is different in the case of a conviction involving sentence of death. The convicted man can appeal without waiting for a petition to be forwarded and considered. He can appeal straightaway, but in the opinion of the court, "in the case of conviction involving sentence of death" means a case in which the sentence of death stands after confirmation, because the court-martial is not complete until the proceedings have been confirmed by the convening officer. Therefore, if the convening officer on confirmation commutes the sentence, it will be no longer a conviction involving

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sentence of death and the ordinary principles with regard to appeal will take effect.

Another matter on which the opinion of the court should be known is this: the right of a person convicted by a court-martial to be present at the hearing of the appeal is different from that of a person convicted by a civil court. In the case of a conviction by court-martial, the applicant or appellant can be present only if the court gives leave. It would be very undesirable, especially in the case of persons serving abroad, to have prisoners brought home here under escort and so forth; and the court will give leave for the prisoner to be present only if they are satisfied that his presence will serve some useful purpose.

As a rule this court will be concerned only with questions of law; we have no power to deal with sentences at all. In that respect the Courts-Martial (Appeals) Act differs from the Criminal Appeal Act. The majority of appeals which come before the Court of Criminal Appeal relate to sentence. It is obvious that, where a matter is one only of law or mixed fact and law, we can deal with the facts, but, as a general rule, leave to be present will not be given unless the court decides that it is necessary in the interests of justice. For instance, there might be cases in which we thought it desirable to hear further evidence. If further evidence was going to be given, it might be necessary to have the appellant present. In the ordinary way we shall not give leave for the appellant to be present. The experience of the court is that in the vast majority of the cases that come before the Court of Criminal Appeal no useful purpose is served by having the appellant present. In the case of appeals against sentence it may be necessary, because the court may intend to increase the sentence or substitute probation, but in the majority of cases prisoners have to be brought very long distances by prison officers who have already too much to do, and their presence at the hearing of the appeal serves no good purpose. I hope that some day that will be altered; at any rate, the court does

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not propose in appeals from courts-martial to give leave to the appellant to be present except where they are satisfied that the ends of justice will be served by so doing.

The facts are these: the appellant had been trying to get on friendly terms with a Greek girl who was working as a civilian typist in the office of the unit where he was stationed, and in November last year he made a proposal of marriage to her, which she refused. In December the murdered man, Captain Mason, arrived to take over command of this unit, and possibly because he thought the appellant had been pestering this girl he told him to keep away from the office, and Houghton was heard to say he had been told to keep away from this girl, both during and off duty, and said: "I will get him"—that is, Captain Mason—"for this." On the evening of February 9 there was a private party at which Captain Mason and this girl were guests. The appellant was at a bar with a number of other soldiers where the unit was stationed, and, at ten o'clock, the sergeant told the men who were still in the bar to go to their tents. Leaving the canteen, one of the soldiers, a man named Davies, looked through a window into the canteen where the dancing was going on at this private party and it so happened that he saw Captain Mason dancing with this girl, and he told the appellant that fact. Then the appellant went to the tent and, after some conversation, picked up a Sten gun and said he was going to get Mason. He came out of the tent carrying the gun, shouting: "Get out of my way." A corporal named Carter, who was a friend of the appellant, tried to grab the gun, but the appellant was evidently in such a state of blind rage that he fired the gun and killed Carter. He then went to the canteen, firing off the gun while he was going, and Captain Mason, hearing the disturbance, came out of the canteen. He ordered the appellant to put down the gun. The appellant deliberately fired straight at him, put several bullets in his body and Captain Mason fell dead. He then wounded other non-commissioned officers who tried to stop him and finally

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a shot was fired at his foot by another sergeant which caused him to fall and he was overpowered. When he was overpowered, he was seen by one of the other officers, a Second-Lieutenant Wagner, and he said: "I know I'll swing for this, Sir," and in such a state of rage was he still that he turned to another sergeant and said: "I'd like to put another magazine through you as well." He was then put under escort and taken to Suez, and on the way he said: "You think that I am mad, but I am as sane as any of you. I know I shall swing for this, but at least I shall die happy because I know he will not have her."

This is just exactly the sort of case with which, unhappily, this court in its civil capacity deals over and over again; the oldest motive for murder is consuming, overwhelming jealousy, and so an attempt was made, as there was no possible defence on the facts, to show that the appellant was insane. There was no evidence that he was suffering from disease of the mind at all. The Army psychiatrist who saw him had numerous questions put to him in the course of a skilled cross-examination suggesting this, that and the other, asking whether this, that and the other would not be symptoms of insanity. The answer was, "Yes, they might be or they were," but, of course, when a man is in a state of mad rage he very often acts as a mad man, but that does not mean that he does not know the nature and quality of the act, and it does not convert what he has done in a mad rage into insanity.

The court desires to say that they think the summing-up of the learned Deputy Judge-Advocate in this case was not only wholly unexceptionable but wholly admirable. It put the law with regard to insanity to the court-martial as fully and fairly as anyone could possibly do. The court-martial was sitting as a jury so far as the facts were concerned and, having been properly directed by the Deputy Judge-Advocate in a way to which it is not suggested any exception could be taken, the court-martial found the appellant guilty, and upon the evidence there is no doubt they had no option but to find him guilty.

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A fortnight ago the Court of Criminal Appeal was dealing with an appeal from a conviction for murder in the case of a man named WINDLE (*ante*, p. 85), in which my brother Devlin, who happens to be sitting as a member of this court, refused to leave the question of insanity to the jury on the ground that there was no evidence of insanity fit to leave to the jury. During the course of the case I said that I myself many years ago at York had taken exactly the same course. It seems to the court that, if this case had been tried in the civil court and the evidence had been the same, there would have been no evidence to leave to the jury because there was no evidence to suggest that the appellant was suffering from any disease of the mind. He had been in the Army for some time. He had been promoted to the rank of acting corporal. No one had detected any signs and it had not been suspected that there was any disease of the mind. Of course, the usual evidence was brought such as one finds in all murder cases, that he had some relative who at some time had been in a home for mental defectives, or something of that sort, which really does not carry the case further.

In this particular case all the court has to say is that the appellant was perfectly fairly tried. A summing-up of unimpeachable character was given to the court and the court-martial could have had no option but to come to the decision to which they came. Therefore, this court can find no ground which would justify them in interfering or setting aside the matter for further investigation. It is not for us to say whether any further investigation should take place. The Secretary of State has ample powers if he thinks fit to use them. It may be he will think that this case is so clear that there is nothing more to be said. At any rate, so far as this court is concerned in the exercise of the only powers Parliament has conferred upon it, we can only say that there is no ground for interfering, and this appeal is dismissed.

As a general rule, without laying down any specific ruling, the court will adopt the same practice as prevails in the Court

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of Criminal Appeal and only one judgment will be delivered. Just as in the Court of Criminal Appeal there have been cases in which more than one judgment has been delivered, so that may happen in this court, but as a general rule only one judgment will be given.

Appeal dismissed.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE SLADE AND MR. JUSTICE PARKER

1952
June 10

KENNETH CHAMBERS

Sentence—Person Under 21—*Duty of Quarter Sessions—Offences of Lead Stealing—Criminal Justice Act*, 1948 (11 & 12 *Geo.* 6, *c.* 58), *s.* 17 (2), (3).

A court of quarter sessions is not bound, under section 17 (2) and (3) of the Criminal Justice Act, 1948, to find any definite reasons in the form of a particular fact or circumstance before deciding to pass a sentence of imprisonment on a prisoner under 21 years of age. The court is entitled, particularly in the case of an offender who is nearly 21, and who has shown that he is not amenable to discipline, if it comes to the conclusion that it is no use ordering him to undergo a period of Borstal training, and if the offence is of a sufficiently grave character, to pass a sentence of imprisonment.

Observations on severe sentences being necessary for offences of lead stealing.

Appeal against sentence.

The appellant pleaded Guilty at Rotherham Quarter Sessions on March 26, 1952, to stealing lead, five similar outstanding offences being taken into consideration, and was sentenced by the Recorder to Borstal detention.

H. Burton for the appellant.

No counsel appeared for the Crown.

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THE LORD CHIEF JUSTICE: The appellant pleaded Guilty at Rotherham Borough Quarter Sessions to two offences of lead stealing and five other similar offences were taken into consideration. He was tried on the same indictment as five other men, constituting a gang who had been committing the same offence. They had between them stolen lead or other metal to the value of just under £1,000, and the appellant had stolen lead to the value of at least £170, including the offences taken into consideration. It is well known that the offence of lead stealing is rampant at the present time and it is a most grave and insidious form of crime. These criminals get on the roofs of churches and other buildings at night and strip them, with the result that the buildings are left exposed and irreparable damage is very often done.

The court has said several times during the last six months that there is only one way of checking these offences and that is to pass very severe sentences on the thieves and, if the receivers are caught, still more severe ones on them. The position with regard to lead stealing is like that which existed after the recent war in relation to obtaining money from the Post Office. The offence of obtaining money from the Post Office by means of forged documents was then rampant. This court then laid down that three years' imprisonment should be the minimum sentence for that offence, and the result was that very few cases of that kind now come before the courts, because it has become widely known amongst people dishonestly inclined that if they were caught—and they always are caught—they would get not less than three years' penal servitude.

When the appellant was before the recorder he was within four months of 21 years of age. Section 17 (2) of the Criminal Justice Act, 1948, provides: "No court shall impose imprisonment on a person under 21 years of age unless the court is of opinion that no other method of dealing with him is appropriate; and for the purpose of determining whether any other method of dealing with any such person is appropriate the

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court shall obtain and consider information about the circumstances, and shall take into account any information before the court which is relevant to his character and his physical and mental condition." Subsection (3) provides: "Where a court of quarter sessions or a court of summary jurisdiction imposes imprisonment on any such person as is mentioned in the last foregoing subsection, the court shall state the reason for its opinion that no other method of dealing with him is appropriate. . . ." Numbers of cases have come before this court in recent months in which the court has come to the conclusion that a sentence of Borstal training is wholly inappropriate. There appears to be an idea abroad among courts of quarter sessions that they have to find some very definite reason, some particular fact or circumstance, before they can send a person under 21 to prison. That is not so. Section 17 (2) obviously means that methods other than prison are to be tried, if possible; but in a case of the gravity of the present case, where the prisoner is on the verge of 21, more especially if he has been in the Army and shown that he is not amenable to discipline, why should it be thought that he will be amenable to discipline at Borstal? In our opinion, courts of quarter sessions ought to understand that they can look on these matters with common sense and come to a conclusion whether it is any use sending a person of the kind before them to Borstal or not. If they come to the conclusion that it is not, and if the case is serious enough, they can deal with it by a sentence of imprisonment.

The appellant had five previous convictions. He was discharged from the Army on medical grounds in October, 1951, with a fair character. In June, 1951, he was fined for causing grievous bodily harm, and he was again fined for causing grievous bodily harm in January, 1952. After leaving the Army he did no work until about three weeks before his trial, when he obtained work as a builder. The Prison Commissioners, in their report, refer to him as "a sullen and vicious youth of violent disposition," and say that it might well be

expedient for him to undergo a period of strict discipline and control. The court is of opinion that it is necessary for him to undergo a period of strict discipline and control, but that this is not a case for Borstal training. We set aside the sentence of Borstal training and substitute a sentence of three years' imprisonment.

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Sentence varied.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE SLADE AND MR. JUSTICE PARKER

WINSTON ANTHONY CHURCHILL

1952
June 16

Sentence—Preventive Detention—Length of Term Appropriate—Criminal Justice Act, 1948 (11 & 12 *Geo.* 6, *c.* 58), *s.* 21 (2).

The court strongly disapproves of sentences of five years' or six years' preventive detention except in the case of an offender who is of such advanced age or in such a poor state of health that a longer sentence might lead to his spending his last days in prison. Except in such cases, if the judge is of opinion that for the particular offence or offences for which the offender is being punished, he ought not to be deprived of his liberty for longer than is involved in a sentence of seven years, the sentence should be one of imprisonment and not preventive detention.

Though eight years should normally be regarded as the minimum length of a sentence of preventive detention, that term should not be regarded as a maximum; and where the record of the offender is such that the safety of the public demands that he should be deprived of the opportunity of preying upon society for a longer period, a longer term of preventive detention should be imposed.

Appeal against sentence.

The appellant was convicted at Salisbury Quarter Sessions on June 29, 1951, of warehouse-breaking and larceny and also

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of simple larceny, 19 similar offences being taken into consideration. He was sentenced by the Recorder to five years' preventive detention.

The facts of the case, so far as they are material, appear fully in the judgment.

The appellant did not appear and was not represented.
No counsel appeared for the Crown.

THE LORD CHIEF JUSTICE: The appellant was convicted on his own confession as long ago as June 29, 1951, before the Recorder of Salisbury of warehouse-breaking and stealing and, on a second count, of simple larceny. 19 other cases were taken into consideration and he was sentenced to five years' preventive detention. On April 3, 1952, he applied for an extension of time in which to appeal against sentence, giving as his reason that he had petitioned the Home Secretary on two occasions to have his sentence changed from preventive detention to imprisonment and, on the second occasion, was told that the Secretary of State had no power to alter the sentence. In ordinary circumstances this court would not entertain an application for extension on this ground, certainly not after so long an interval, in a case where it was not suggested that the sentence was one which the Recorder had not the power to pass; but as a sentence of five years' preventive detention is one which this court has not once, but often, stated should be passed only in the case of an offender of such an advanced age, or such a state of health, that a longer sentence might lead to his dying, or at least spending his last days, in prison, the court has given leave and will reconsider the matter, and at the same time try once again to make it clear to recorders and courts of quarter sessions why it is undesirable to pass such a sentence as this.

It would first be desirable to state briefly the facts relating to the appellant's previous record. He was at the time of his conviction aged 31 and up to 1946 had had a series of convictions. Ignoring those before juvenile courts, in September,

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1939, he was sent to Borstal for office-breaking, larceny and receiving, three other cases being taken into consideration. He seems to have been detained in Borstal only a short time and, in October, 1940, he was sentenced to 18 months' imprisonment at assizes for larceny and two cases of shop-breaking, 10 other cases being taken into consideration. He could only have been out of prison a few weeks before he was before a magistrates' court in November, 1941, for larceny and was given a chance by being bound over for 12 months. While still under recognisance, he was charged with two offences of stealing money and received consecutive sentences of five and five months' imprisonment. At Middlesex Quarter Sessions in June, 1944, for office-breaking, larceny and possessing housebreaking implements by night and attempted office-breaking he received a sentence of three years' penal servitude and other concurrent sentences. On this occasion eight other offences were taken into consideration. He was discharged from that sentence some time in June, 1946, and it is only fair to him to say that from that time until 1951 he appears to have kept out of trouble. He got employment with a coal merchant at Salisbury and lost that situation through no fault of his own, but owing to the bankruptcy of his employer from whom he received an excellent testimonial. He got other employment, but at the end of March and throughout April, 1951, committed 19 different offences in addition to those for which he was indicted, many of which were offences of shop- or office-breaking, some of larceny and three or four of false pretences. In his petition to the Home Secretary and in his notice of appeal he makes it clear that he is not appealing against the length of sentence, but merely asks that he should receive imprisonment and not preventive detention. It is not clear, therefore, why he desires to appeal, because the conditions of preventive detention, at any rate for the latter part of the sentence, are not as rigorous as those of ordinary sentences of imprisonment and he can earn just the same remission. But

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it does not follow because of this that the sentence is necessarily a proper one and, of course, a prisoner may feel that, if he offends again, it may go more hardly with him if his record shows a sentence of preventive detention.

Now the court has no desire to be censorious, but at the same time we think it must have been clear by the middle of last year that this court strongly disapproved of sentences of five years' or six years' preventive detention, except, as we have already said, in the case of an elderly prisoner who, if sentenced to a long term, might spend his last years in a prison. The reasons why this court does disapprove of these sentences had therefore better be restated, I hope with clarity, and we trust also that attention will be paid to them.

The object of preventive detention is to protect the public from men or women who have shown by their previous history that they are a menace to society while they are at large. There comes a time when it is not a question of punishment, for that has been shown to be of no use, but of a necessity to put these offenders in confinement so that they can no longer prey upon the public. Parliament, therefore, obviously intended that in the case of such persons a court should be empowered to pass a longer sentence than it otherwise would have done, for the protection of the public, and should also be able to send a prisoner to preventive detention for a longer term than would otherwise have been lawful under the statute against which he had offended. As an illustration, and one that may often occur, we would take the case of attempted house-breaking. Although this court has recently held that for the misdemeanour of attempting to commit a felony a court is no longer restricted to passing a sentence of only two years' imprisonment, nevertheless there are many cases in which no longer sentence would be passed for an attempt on a prisoner without a long record behind him. But if a person with a serious record of crime is detected in attempting to commit an offence, but is arrested before he has time to perfect his intention, in many cases it is perfectly right to pass a sentence

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of preventive detention, as by the attempt he has shown that he is continuing to live a life of crime. Now considering, as we have already said, that exactly the same remission can be earned from a sentence of preventive detention as from a sentence of imprisonment, it follows that on a sentence of five years' preventive detention a prisoner will be detained, if he behaves himself, only for three years and four months, which is far too short a time to afford any real protection to the public, and moreover is unlikely to effect any change in the prisoner's habits. Another matter which ought to be remembered—and this applies equally to corrective training—is that there are only a limited number of establishments which are set aside for these new forms of punishment. If the preventive detention establishments are filled up with prisoners sentenced to short terms, it is obvious that the Prison Commissioners may have difficulty in providing accommodation for those who have received substantial sentences in the public interest. This is one of the reasons why this court has said that it is undesirable to send to corrective training any prisoner whom the Commissioners have reported to be unsuitable. The fact that they have reported that he is suitable is not conclusive. It is for the court to decide whether to impose such a sentence or not, but if the prisoner is reported as unsuitable it is most undesirable that such a sentence should be passed, because it means that he will be occupying a place which might be reserved for a man of whom the Commissioners think there is a chance that he may benefit.

With regard to preventive detention, we desire to repeat that if a court is of opinion, whatever a man's record may be, that for the particular offence or offences for which he is being punished the court is not prepared to deprive him of his liberty for longer than is involved in a sentence of five or six, and we would add seven, years, the sentence should be one of imprisonment except in the case of elderly men, with which we have already dealt. If the court is of opinion that the safety of the public demands that the offender should be placed in preventive

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detention, he should be sent for such a period as will be a real protection to the public and not give them merely a respite from his activities for three or four years. In this respect we would, however, say that because the court has said that, generally speaking, the minimum period should be eight years there seems to be a tendency to turn that period into a maximum. The great majority of sentences of preventive detention that have come before this court have been cases in which a sentence of eight years has been passed. In many of them the records of the prisoners are such that sentences of 10, 12, or even the maximum of 14, would be well deserved. It is not a question of severity. As we have already said, when such sentences have to be passed the time for punishment has gone by, because it has had no effect. It has become a matter of putting a man where he can no longer prey upon society even though his depredations may be of a comparatively small character, as in the case of habitual sneak thieves.

We will now consider what the proper sentence upon the appellant should have been. Most emphatically it should not have been five years' preventive detention. He does not apply to be present, so we can deal with the sentence at once. He asks that it should be changed to one of imprisonment instead of preventive detention, and that is what we propose to do. The sentence will be set aside and one of five years' imprisonment substituted, to date from conviction.

Sentence varied.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE SLADE AND MR. JUSTICE PARKER

BARRY HADLEY PEGG

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Magistrates—Committal to Quarter Sessions for Sentence—Offenders Approaching 21 *Years of Age—Criminal Justice Act*, 1948 (12 & 13 *Geo.* 6, *c.* 58), *ss.* 20 (3) (5), 29 (1).

Where magistrates are considering committing an offender to quarter sessions for sentence under section 20 (3) of the Criminal Justice Act, 1948, in which case the powers of quarter sessions are limited by subsection (5) to imposing a sentence of Borstal training or such sentence as could have been imposed by the magistrates themselves, they should consider, especially in the case of an offender approaching 21 years or age, whether it would not be better to commit him under section 29 (1) instead, in which case there is no such limitation on the powers of quarter sessions as is imposed by section 20 (5).

Application for leave to appeal against sentence.

The applicant was convicted by a magistrates' court of larceny and was committed, under section 20 (3) of the Criminal Justice Act, 1948, to Leicestershire Quarter Sessions for sentence, where, on January 8, 1952, he was ordered to undergo a period of Borstal training.

No counsel appeared.

SLADE J. [after stating that, in the opinion of the court, there was no ground for interfering with the sentence] : I desire to add that magistrates at petty sessions, when they are considering committing a prisoner to quarter sessions under section 20 of the Criminal Justice Act, 1948, with a view to his being sentenced to Borstal training, should also consider,

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particularly when the prisoner is nearing the age of 21, whether it would not be better to commit him to quarter sessions for sentence under the provisions of section 29 rather than under the provisions of section 20, where quarter sessions, if they decide that Borstal training is not suitable, are limited to awarding such a sentence as could have been imposed by the magistrates themselves. There is no such limitation on the powers of quarter sessions when the prisoner is committed for sentence under the provisions of section 29.

Application refused.

[DIVISIONAL COURT CASE]

BEFORE

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THE LORD CHIEF JUSTICE, MR. JUSTICE HILBERY, MR. JUSTICE SLADE, MR. JUSTICE DEVLIN AND MR. JUSTICE PARKER

R. *v.* MIDDLESEX QUARTER SESSIONS; *ex p.* DIRECTOR OF PUBLIC PROSECUTIONS

Procedure—Irregularity—Jury Invited by Chairman to Acquit on one Count after Counsel's Opening—Verdict of Not Guilty by Direction—Certiorari to Quash Acquittal—No Mistrial.

A defendant appeared at quarter sessions charged with driving while under the influence of drink and with dangerous driving. He pleaded Not Guilty to the count alleging the former, and Guilty to the count alleging the latter, offence. The Chairman said to prosecuting counsel: "I have read the depositions very carefully. I do not think any jury would convict him on the first charge," but counsel decided to proceed, and jury were sworn and the defendant was given in charge. On the conclusion of counsel's opening disclosing a prima facie case with regard to the former offence, and before any evidence was called, the Chairman invited the jury to look

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at an exhibit containing specimens of the defendant's handwriting during the course of his examination by the police doctor and expressed the view that that handwriting was inconsistent with the defendant being under the influence of drink. He then said to the jury: "On that opening and that document, I have to ask you: 'Do you want to hear the evidence on that charge?'." The foreman replied: "Under your direction, I should say no, my Lord," and a verdict of "Not Guilty by direction" was entered. The Director of Public Prosecutions applied for an order of certiorari to quash the purported acquittal and an order of mandamus directing the court to try the defendant on the count for driving while under the influence of drink, on the ground that the purported trial was, in effect, a nullity.

Held, that, though the trial had been deplorably irregular, it did not amount to a mistrial in the legal sense or a nullity, as no error would have been apparent on the record when drawn up, the defendant had been properly arraigned, and the jury, having been properly sworn to try him, so that he was technically in peril, had returned a verdict of Not Guilty. The Divisional Court, therefore, could not intervene and the application must be refused.

Motion for orders of certiorari and mandamus.

On May 7, 1952, one Peter Edward Bromley-Martin (the defendant) appeared at Middlesex Quarter Sessions, being charged on an indictment containing two counts. The first charged him with driving a motor-vehicle when under the influence of drink to such an extent as to be incapable of having proper control of the vehicle, contrary to section 15 of the Road Traffic Act, 1930, and to that count he pleaded Not Guilty. The second charged him with dangerous driving, contrary to section 11 of the Act, and to that he pleaded Guilty. Before the jury were sworn, the Chairman said to prosecuting counsel in their presence: "I have read the depositions very carefully. I do not think any jury would convict him on the first charge." Counsel for the prosecution, however, elected to proceed, and the jury were sworn and the defendant was given into their charge. At the conclusion of counsel's opening and before any evidence was called, the Chairman invited the jury to look at an exhibit containing

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specimens of the defendant's handwriting when he was being examined by the police doctor, and expressed the view that the handwriting was not that of a person under the influence of drink. He then said to the jury, " On that opening and that document, I have to ask you: 'Do you want to hear the evidence on that charge?'." The foreman replied: " Under your direction, I should say no, my Lord," and a verdict of " Not Guilty by direction " was entered. The Director of Public Prosecutions obtained leave to apply for an order of certiorari to quash the purported acquittal and for an order of mandamus directing the court to try the defendant on the first count, on the ground that the purported trial had been, in effect, a nullity.

The Attorney-General (*Sir Lionel Heald, Q.C.*), *Melford Stevenson, Q.C.*, and *J. H. Buzzard*, for the applicant.

H. B. H. Hylton-Foster, Q.C., and *F. H. Lawton*, for the Chairman and justices.

James Burge, for the defendant.

Cur. adv. vult.

June 27. The following judgment was read by :—

THE LORD CHIEF JUSTICE: The judgment I am about to read is the judgment of the court.

In this matter Mr. Attorney moves for an order of certiorari to remove into this court and quash the purported acquittal of one Peter Edward Bromley-Martin recorded by the court of quarter sessions for the County of Middlesex on May 7, 1952, and an order of the said court discharging the said Bromley-Martin on the first count of an indictment against him charging that he, on March 24, 1952, when driving a motor-vehicle on a road known as Watford Way at Edgware was under the influence of drink to such an extent as to be incapable of having proper control of the said motor-vehicle, and for an order of mandamus that the said court do try the said defendant upon this count. In substance the ground upon

which the orders were sought was that the defendant had never been tried on the indictment and that the Chairman without any evidence being called or given had directed or procured the jury to return a verdict of Not Guilty so that the purported trial was, in effect, a nullity.

The Attorney-General described the application as unprecedented and certainly the facts, which it will be necessary to set out at length, are such that the court hopes nothing like them have ever occurred before or will ever occur again.

The defendant had been committed for trial on two charges. One, to which we have already referred, was driving under the influence of drink. The second was driving in a manner dangerous to the public, and on arraignment he pleaded Not Guilty to count one and Guilty to count two. Thereupon the learned Chairman said to Mr. Buzzard, who was prosecuting on the instructions of the Commissioner of Police, "I have read the depositions very carefully. I do not think any jury would convict him on the first charge. I say that at once." To that Mr. Buzzard replied: "I have certain instructions in this matter, my Lord. My instructions are to proceed on that count, because in the view of my instructing solicitor, and, indeed in mine, there is evidence upon that count fit to be considered by the jury." The Chairman then said: "All right. Let the jury be sworn. I shall give them my view of it, anyway." At this time jurymen were already in the box waiting to be sworn and heard the dialogue which I have mentioned. It is difficult to understand how the Chairman could suppose that they could fairly and impartially try a case after hearing him express the opinion, formed, as he said, after reading the depositions very carefully, that he did not think any jury would convict, and, in saying that he proposed to give them his view of it, he obviously meant that he was going to tell the jury that in his opinion they ought not to convict. As the Chairman said that he had read the depositions very carefully, we propose to state what those depositions disclose. It appears from them that the defendant was driving along the

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Watford By-Pass in the direction of Edgware. The deposition of a Mr. Axell was to the effect that he was driving in the same direction as the defendant who was in front of him. The latter's car was swerving across the road. It went over to the wrong side, came over to its own side, hit the grass verge, went up on to the kerb and on to the verge for about a foot. There was nothing in the road to make it swerve and, seeing another car coming in the opposite direction, which in fact turned out to be a police car, the witness put on his brakes as he anticipated an accident. Police Sergeant Joyner stated that at 12.10 a.m. he was in a police car and saw the defendant's car coming towards him travelling north. He saw it swerve across the road and strike the kerb on the near side as the police were driving and, therefore, on the defendant's off side. The car straightened out after striking the kerb and the driver of the police car slowed down and pulled right in to his near side. Just before the defendant's car reached them it swerved over, narrowly missing the off side of the police car, and then went straight across the road striking the near side kerb. The front near side wheel of the car mounted the verge and continued swerving as it went down the road. The police car turned, caught up with the defendant and stopped him. The sergeant went to the car and asked the defendant to get out. He stepped into the roadway and was very unsteady on his feet and he held on to the door of the car for support. His breath smelt very strongly of liquor and his face was very flushed. The officer asked him if he was ill and he said: "Never felt better." His speech was very slurred. The sergeant asked him to switch off his engine and, releasing his hold on the car door to do so, the defendant fell forward on to the driving seat. He was arrested and taken to Edgware Police Station where he arrived at 12.18 a.m. He was told that the police proposed to have him medically examined and was asked if he desired a private doctor. At that time he declined the offer. The police doctor examined the defendant from about 12.25 a.m. to 1 o'clock and when the examination

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was over the defendant asked for a private doctor, but one could not be found till about 2.25 a.m. In cross-examination the officer said that the accused struck the kerb on two occasions, that when the accused fell forward he lifted him up and it was a police officer who switched the engine off. The police doctor gave evidence, but it is unnecessary to set out at length the symptoms to which he deposed. He came to the conclusion that the accused was under the influence of alcohol to such an extent as to be incapable of having proper control of a motor-vehicle. In cross-examination he said he was not very drunk, that he did not consider it to be a bad case, that it was a borderline case but over the border. Notice of additional evidence had been served on the accused which was corroborative of the police sergeant's evidence and I need not therefore set it out. It is indeed difficult for this court to understand how the learned Chairman could have thought that there was nothing for the jury to consider on the drink charge. No explanation had been offered as to why the defendant was driving in the way in which he was. That he was driving dangerously there was no doubt, for he pleaded Guilty; and if he was not under the influence of drink, what possible explanation could there be? If that is the way in which the defendant drives when he is sober, he is a public danger of the worst description and should be disqualified for life, or at least for a long period, though, as will be seen hereafter, the court refrained from imposing any disqualification at all. From first to last no explanation was ever given, either before the magistrates or before the sessions, by the defendant, who gave no evidence as to why he was driving in the way in which he was.

The learned Chairman having expressed the view that he did, Mr. Buzzard very properly insisted on opening the case and proceeding with the prosecution. He opened the facts which we have mentioned and in addition described in fuller detail than is necessary here to set out the symptoms found by the doctor on his examination. When the opening was finished and before any evidence was called, the Chairman

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interposed and said to Mr. Buzzard: "I cannot, of course, say there is no evidence, but look at that handwriting." The exhibits he handed to counsel were those written by the defendant during his examination by the doctor. At this time, of course, they had not been proved, but had been referred to by Mr. Buzzard in his opening address. The Chairman said: "Let the jury look at it. It is extremely good. Just look at it, members of the jury. That is handwriting which, it is suggested, is the handwriting of a man under the influence of drink. It is a matter entirely for you, but I think it is just sheer waste of time for you to consider it. But the other charge you have not got to consider, because he has pleaded Guilty to it." Perhaps it is only fair to say that Mr. Buzzard had said that the writing appeared to be quite satisfactory, but apparently neither he nor the Chairman had noticed that the defendant, who is apparently a man of some position and education, spelt "Suffolk" with two "l's" in one place and "Woodbridge" with two "b's" in the other, which would seem perhaps to call for some little explanation. At any rate, when the exhibits were handed to the jury they had not been proved and no question had been asked about them. Mr. Burge, who was appearing for the defendant, then said: "My learned friend did not open and did not say that the private motorist also saw and spoke with the accused and noticed nothing about him." I am sure Mr. Burge did not mean to overstate the effect of the witness's evidence, but if he was referring to Mr. Axell, who was the only private motorist called, I cannot see in his deposition that he said he spoke to the accused. What he did say was that he saw him speak to the police. He was speaking rather slowly "but nothing else about him attracted my attention." He does not seem to have had any conversation with the accused himself or to have done more than observe him speaking to the police.

The Chairman then continued: "I have read the depositions carefully, and that is why I expressed the view I did. I have no desire that your client's time should be wasted unnecessarily, nor, I may add, mine." If the Chairman had

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read the depositions carefully, it is all the more difficult to understand why he expressed this view. Then he continued: "I should have thought, members of the jury, that as far as that charge is concerned, you can consider that as being answered by that handwriting, at least. In other words, he is Not Guilty of that; but we can deal with him, of course, on the dangerous driving charge to which he has pleaded Guilty. On that opening and on that document, I have to ask you: Do you want to hear the evidence on that charge? You observe from the handwriting that he lives at Woodbridge, in Suffolk, which might quite easily explain why he did not know where he was. Mr. Foreman, do you want to hear any evidence on the drink charge?" The foreman of the jury then said: "Under your direction, I should say no, my Lord." The matter then continued by the Chairman saying: "Is that the verdict of you all?", and the foreman saying: "Yes, that is so." The Chairman said: "Then he will be found Not Guilty on that charge," and then the court conferred and announced that he would be fined £25, and that they did not propose to suspend his licence. Having thus imposed a quite inadequate penalty, the Chairman went on to say: "Obviously, he is a man who must take care about his driving, having regard to the fact that he is an injured man. He should be particularly careful not to involve himself in anything which looks like danger." I think it is unnecessary to comment upon such observations as those, but to suggest to the jury that the fact that he lived at Woodbridge was a reasonable explanation of his having told the police that he did not know where he was, when, in fact, he was on a main artery a few miles out of London, is too absurd to need further comment.

The court can only express its gravest disapprobation of the conduct of the learned Chairman. He is a man to whom the lay members of the court have a right to look for guidance, and on whom they are entitled to rely for the proper conduct of cases which are brought to be tried on indictment before them. The explanation which he has offered is, that from his

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experience gained at the Bar and as chairman of various quarter sessions, he was quite certain that no jury would have convicted. It was not for the learned Chairman to try the case himself. The prosecution had a right to present their case. It is not his duty to take sides or to do all he can to secure the acquittal of a prisoner. It is his duty to hold the scales evenly and to sum up the case if there is evidence fit to be left to the jury, as on the depositions there unquestionably was, and to place before them fairly and impartially the evidence given by the prosecution and the matters submitted by the defendant. That a judge may express his own opinion on matters arising out of the evidence there is no doubt, and no one would wish to prevent him doing so, provided he does it temperately and fairly. He has said in his affidavit that he did not intend to withdraw the case from the jury nor did he intend to direct them what to do. He says that he intended that the jury should there and then consider whether they wanted to hear evidence to support the facts opened by counsel for the prosecution when such facts disclosed what he thought was a weak case. We find it difficult to accept that explanation, for what he did could only have indicated that he desired the jury to stop the case, and indeed, that he was determined they should do so. From first to last the conduct of the Chairman in this case can only be described as both unjudicial and injudicious. This was a serious case preferred by the direction of the Commissioner of Metropolitan Police. It was in fact never tried, because the Chairman prevented it from being tried, and to pretend that there has been here the free exercise by the jury of their right to acquit on the merits need only be stated to be rejected. The answer of the foreman of the jury clearly shows that they understood that he was directing them to acquit, and that seems also to have been the opinion of the clerk of the peace, for he indorsed the indictment with regard to count No. 1: "Verdict Not Guilty by direction."

As I have said, the Attorney-General contends that in this case there has been no trial at all, and therefore he submits

that the order of discharge should be quashed and this court should order that the case should be heard according to law. That it was not heard according to law in one sense is perfectly true, for the proceedings of the Chairman were irregular from beginning to end, and his action prevented any evidence from being given. Again, in one sense it is true to say that there has been no trial, but this court has no power to order a retrial in any case unless there has been what in law can properly be described as a mistrial and consequently a nullity. Moreover, though there have been cases in which the court has ordered a *venire de novo* because of a mistrial, we have not been referred to a single case, nor can one be found, where this has been done after a verdict of Not Guilty has been recorded. The Attorney-General relied particularly on WANDSWORTH JUSTICES, *ex p.* READ [1942] 1 K.B. 281. The headnote, which conveniently summarises the decision, is: "Where there has been a denial of natural justice before a court of summary jurisdiction, resulting in the conviction of a defendant, his remedy is not by case stated or appeal to quarter sessions, but by application to the High Court for an order of certiorari to remove and quash the conviction." But that, it will be observed, was not only a case dealing with a court of summary jurisdiction but one in which there had been a conviction; and the books are full of cases where this court has interfered and quashed convictions where there has been a denial of what is for convenience called natural justice. There is in fact no case to be found in the books in which the court has ever ordered a retrial after a verdict of Not Guilty. One case to which our attention was called was MARSHAM, *ex p.* PETHICK LAWRENCE [1912] 2 K.B. 362, which was followed in BANNISTER *v.* CLARKE [1920] 3 K.B. 598. In the first case a person was convicted of assaulting a police constable, and by inadvertence the constable gave his evidence unsworn. On discovering this fact the magistrate reheard the case, had the witness sworn and came to the same conclusion and convicted. It was held that, as the first proceedings were a mere nullity,

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no plea in the nature of *autrefois convict* could be set up because the applicant had never been in peril on the first hearing owing to the irregularity. But here we are unable to say that there has been anything in the nature of a mistrial. To constitute a mistrial the proceedings must have been abortive from beginning to end so that had the record been drawn up the error would have been apparent (NEAL, 33 Cr.App.R. 189; [1949] 2 K.B. 590). The fact that the jury have acquitted without evidence would not appear upon the record. This is what happens whenever counsel for the prosecution offers no evidence. The prisoner is then in charge of the jury and they are directed to return a verdict of Not Guilty, no evidence having been offered. The verdict is received and recorded and the prisoner discharged. Suppose counsel in the exercise of his discretion offered no evidence, it would not be open to the prosecutor to come to this court and ask that the case should be sent down for retrial because he wanted evidence given and did not agree with the course that counsel had adopted. Here the defendant was properly arraigned and the jury sworn to try him, so technically he was in peril, and as they returned a verdict of Not Guilty, however improperly that verdict may have been obtained, this court cannot, as it seems to us, direct a new trial. In SIMPSON [1914] 1 K.B. 66 at p. 75, Scrutton J., as he then was, said: "There never has been a case in which an acquittal by a court of summary jurisdiction has been quashed by certiorari, and, although in some cases judges have acted *proprio vigore* in making precedents, I do not myself feel disposed to do so in this case." Nor do we; an acquittal by a jury seems to be *a fortiori*.

I do not think it necessary to go in detail through the large number of cases which were cited to us. None of them, in my opinion, support the proposition that we could order a retrial in this case. The trial was deplorably irregular, but it was not a mistrial in the legal sense. This was obviously a proper case to bring before this court, but for the reasons that

I have given it is impossible for us to interfere, and the application must therefore be refused.

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Application refused.

Solicitors: C. W. Radcliffe, for the Chairman and Justices of Middlesex Quarter Sessions; Clifford-Turner & Co., for the defendant.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HILBERY AND MR. JUSTICE SLADE

SYDNEY JOSEPH BOURNE

1952
July 14

Unnatural Offence—Bestiality—Aiding and Abetting—Wife Compelled to Submit by Duress of Husband.

Special Verdict—Proper Only in Most Exceptional Cases.

The appellant was convicted of aiding and abetting his wife to commit buggery with a dog. The appellant sexually excited the animal, and (as the jury found by their verdict) compelled his wife by duress to submit to the animal having connection with her *per vaginam*.

Held, that as the offence of buggery, whether with man or beast, does not depend on consent, but on the commission of the particular act, the conviction was right.

Observations on the undesirability of a special verdict in any but the most exceptional cases.

Appeal against conviction (on certificate) and application for leave to appeal against sentence.

The appellant was convicted at Worcestershire Assizes on May 21, 1952, on two counts of an indictment charging him with aiding and abetting his wife to commit buggery with a dog, and was sentenced by Hallett J. to eight years' imprisonment. He was also convicted on two counts charging

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incitement to commit buggery, and on two counts charging indecent assault on his wife, and in respect of these he received concurrent sentences.

The indictment alleged an offence to have been committed on two separate occasions. The evidence showed that the appellant had on each occasion sexually excited the animal, and then caused his wife to submit to its having connection with her *per vaginam*. The wife stated in her evidence that she had been terrorised into submission and that the acts were entirely against her will. The judge left questions to the jury as follows:—(1) "Did the prisoner on a day in or about the month of September, 1949, in the county of Stafford cause his wife, Adelaide Bourne, to have carnal knowledge of a dog?" to which the jury replied: "Yes." (2) "Are you satisfied that she did not consent to having such carnal knowledge?" to which the jury replied: "Yes, we are satisfied she did not consent," and he also left two similar questions with regard to the second offence, and the jury returned similar answers.

Geoffrey Green, for the appellant:

The facts found by the jury were that the appellant caused his wife to have carnal knowledge of a dog. There was no finding of fact that he was present when she had such carnal knowledge, and therefore the facts were insufficient in law to support his conviction of aiding and abetting. The court cannot supply by intendment or implication any facts required to cure the defect in the facts found: 2 East P.C. 708, 784; Archbold's Criminal Pleadings, 32nd ed., p. 202. Secondly, the appellant could not be convicted of aiding and abetting unless the person aided and abetted was also guilty as a principal. Here the appellant's wife could not have been convicted since she acted under the coercion of her husband; she was, therefore, not a principal in the commission of the offence, but a victim of it. The appellant's position is similar to that of someone aiding and abetting a person of unsound mind: see TYLER (1838) 8 C. & P. 616, where it was held that there could not be a conviction of aiding and abetting a person

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of unsound mind. An accessory before the fact may avail himself of all defences which are open to the principal: Foster's Crown Cases, pp. 364 *et seq.*; so also may an aider and abettor. There must be some common design in which the aider and abettor are acting together: 1 Foster's Crown Cases, p. 351. Here there was no community of design.

John Bussé, Q.C., and *Max Holdsworth*, for the Crown were not called on.

THE LORD CHIEF JUSTICE: The appellant was indicted before Hallett J. at the last assizes for Worcestershire and convicted of aiding and abetting his wife to commit the offence commonly called bestiality. The circumstances were such that nobody can approach this case without feeling the utmost repulsion, and indeed the learned judge thought it right, and I think he was quite right, to have a special report on the sanity of the appellant before he tried him. Without going into more of the revolting facts of this case than one can help, the appellant, who is only 28 years of age, his wife being a year or two younger, compelled her on two occasions to submit to the insertion of the male organ of a dog which he had excited into her vagina. That such a man should be allowed to be at large is almost intolerable and dreadful. Though he denied the offence when he went into the witness box, he had admitted it to the police. He had gone to the police to inquire where his wife and children were. The police meantime had been informed of what had been going on, I suppose on complaint by the wife, and they told him what had been suggested and he made a full confession to them, saying he admitted he had been a brute to his wife.

For some reason, which I do not think any of the members of the court quite appreciate, the learned judge thought that there was some question of law arising here because it was said that the wife consented to the act, and the learned judge accordingly left certain questions to the jury and asked them to find a special verdict. Special verdicts ought to be found only in the most exceptional cases, and in this case no member

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of the court has been able to find that there is any exceptional question of criminal law involved.

The case against the appellant was that he was a principal in the second degree to the crime of buggery which was committed by his wife, because if a woman has connection with a dog, or allows a dog to have connection with her, that is the full offence of buggery. She may be able to show that she was forced to commit the offence. I will assume that the plea of duress could have been set up by her on the evidence, and in fact we have allowed Mr. Green to argue this case on the footing that the wife would have been entitled to be acquitted on the ground of duress. The learned judge left no question to the jury on duress, but the jury have found that she did not consent. Assuming that she could have set up duress, what does that mean? It means that she admits that she has committed the crime but prays to be excused from punishment for the consequences of the crime by reason of the duress, and no doubt in those circumstances the law would allow a verdict of Not Guilty to be entered. I have only to read a passage from Blackstone's Commentaries (Vol. 4, p. 27) to show that that is the true position: "The same principle which excuses those who have no mental will in the perpetration of an offence protects from the punishment of the law those who commit crimes in subjection to the power of others, and not as the result of an uncontrolled free action proceeding from themselves. Thus, if A by force takes the hand of B in which is a weapon, and therewith kills C, A is guilty of murder, but B is excused; but if a merely moral force is used, as threats, duress of imprisonment, or even an assault to the peril of his life, in order to compel him to kill C, it is no legal excuse." See also 1 Hale's Pleas of the Crown, pp. 44, 51. That means that duress is not a legal excuse for murder. There may be certain doctrines with regard to murder which do not apply to other cases, but I am willing to assume for the purpose of this case, and I think my brethren are too, that if this woman had been charged herself with committing the

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offence, she could have set up the plea of duress, not as showing that no offence had been committed, but as showing that she had no *mens rea* because her will was overborne by threats of imprisonment or violence so that she would be excused from punishment. But the offence of buggery whether with man or beast does not depend upon consent; it depends on the act, and if an act of buggery is committed, the felony is committed.

A point is raised here that the appellant was charged with being not merely an accessory before the fact but with being an aider and abettor. So he was, because the charge is: "you being present aided and abetted, counselled and procured." The only questions that were left to the jury by the learned judge, and he was not asked to leave any more, were these: (1) "Did the prisoner on a day in or about the month of September, 1949, in the County of Stafford cause his wife Adelaide Bourne to have carnal knowledge of a dog?" and the jury have found that he did. (2) "Are you satisfied that she did not consent to having such carnal knowledge?" The answer of the jury was: "Yes, we are satisfied she did not consent." Then the same two questions were asked with regard to the other day on which an offence was alleged to have been committed.

In the opinion of the court, there is no doubt that the appellant was properly indicted for being a principal in the second degree to the commission of the crime of buggery. That is all that it is necessary to show. The evidence was, and the jury by their verdict have shown they accepted it, that he caused his wife to have connection with a dog, and if he caused his wife to have connection with a dog he is guilty, whether you call him an aider and abettor or an accessory, as a principal in the second degree. For that reason, this appeal fails and is dismissed.

Appeal dismissed.

[COURTS-MARTIAL APPEAL COURT]

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HILBERY AND MR. JUSTICE SLADE

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Courts-Martial Appeal Court—Practice—When Leave to Appeal Will be Granted.

The Courts-Martial Appeal Court will follow the practice of the Court of Criminal Appeal in granting leave to appeal, and will grant leave only if it appears that there has been some misdirection in point of law, or that the evidence in law does not support the conviction, or that the conviction cannot be supported having regard to the evidence.

Application for leave to appeal against conviction.

The applicant was convicted by district court-martial in Germany of when on active service striking his superior officer, and was sentenced to be reduced to the ranks and to 84 days' detention.

At about 1.15 a.m. on January 20, 1952, a new squadron sergeant-major who had recently joined the applicant's unit, the Royal Tank Regiment, saw one of the unit's trucks standing unattended in a street, which was a breach of regulations. He went into a café, where he saw the driver, a corporal and the applicant, who was dressed in civilian clothes, and ordered them back to camp, himself travelling with them in the truck. About 2 a.m. he went to bed and was woken by a blow on the left side of his head. He put up his hand and received a second blow, which temporarily knocked him out, but, on opening his eyes, saw someone in civilian clothes hitting a bottle against the palm of his hand. He said to his assailant: "I know who you are; you are Sergeant Condon." The assailant made no reply, but struck him another blow on the right temple, which temporarily knocked him out.

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The applicant applied for leave to appeal on the ground that the court's finding was unreasonable, and that it would be unsafe to allow the conviction to stand, his contention being that the identification was unsafe and unreliable.

No counsel appeared.

THE LORD CHIEF JUSTICE [after referring to the facts]: As this court has very recently been established, it is well that persons who apply for leave to appeal against conviction should know that this court can act only upon the same principles as are acted upon in the Court of Criminal Appeal. It is right and reasonable that the court should, because the provisions in the Courts-Martial (Appeals) Act, 1951, as to the grounds of appeal, the powers of the court and so forth are taken from the Criminal Appeal Act, 1907, the only difference in substance being that the Court of Criminal Appeal has power to deal with sentences, but Parliament has not given the Courts-Martial Appeal Court any power to deal with sentences, but only power to deal with convictions. In dealing with convictions, we must treat a court-martial, which is composed of officers in accordance with the provisions of the Army Act, in exactly the same way as the way in which we deal with juries. They are the judges of fact, and we can interfere with a conviction on appeal only if it appears either that there has been some misdirection in point of law or that the evidence in law does not support the conviction or that the conviction cannot be supported having regard to the evidence. Ever since it was established in 1908, the Court of Criminal Appeal has always adopted the principle that it will not put itself in the position of a jury and re-try the case, because to do so would be to usurp the functions of a jury and to substitute trial by a judge for trial by jury. It has been considered that one of the greatest safeguards of accused persons in this country is trial by jury. So, therefore, as a court-martial is the appropriate and constitutional tribunal which deals with questions of fact, we can only look to see whether there was evidence which

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justified the court-martial in coming to the conclusion to which it came and whether there has been misdirection by the Judge-Advocate.

In this case, the Judge-Advocate called the attention of the court to the fact that there was only one witness, the sergeant-major himself, who had undoubtedly been seriously assaulted. The Judge-Advocate impressed on the court that the question was purely one of identity, he reminded them of the evidence with regard to the state of the light and the lack of opportunity or slight opportunity which the sergeant-major had of recognising his assailant. He also reminded them that, where a man has received a severe blow on the head, there is some ground for supposing he might make a mistake. The court had the priceless advantage, which we have not had, of seeing the witnesses, hearing how they gave their evidence and observing their demeanour, and the court came to the conclusion that the offence was proved.

There is no ground, therefore, on which we could possibly grant leave to appeal. It would be useless to grant leave unless we were satisfied that there was at least an arguable case for reversing the decision of the court-martial within the limitations of the power of this court which I have indicated. The application is, therefore, refused.

Application refused.

BEFORE

MR. JUSTICE SLADE, MR. JUSTICE DEVLIN AND MR. JUSTICE GORMAN

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Judges' Rules—Person "in Custody"—Broadmoor Patient.

Evidence of Similar Acts—Murder—Killing of Little Girl by Strangling — Evidence of Previous Killings in Similar Circumstances Admitted—Issue of Identity.

Rule 3 of the Judges' Rules, which provides that "persons in custody should not be questioned without the usual caution

being first administered" refers to persons who are in the custody of the police, and does not apply to a person who is in custody as a Broadmoor patient.

The appellant, a Broadmoor patient, was charged with the murder of a little girl, the allegation of the prosecution being that he had strangled her during a period of escape from Broadmoor. The judge at the trial admitted evidence of confessions by the appellant that he had within the last year strangled two other little girls in extremely similar circumstances.

Held, that the evidence was rightly admitted, as it was relevant to the issue of identity.

MAKIN *v.* ATT.-GEN. FOR NEW SOUTH WALES [1894] A.C. 57, THOMPSON *v.* DIRECTOR OF PUBLIC PROSECUTIONS, 13 Cr.App.R. 61; [1918] A.C. 221, and HARRIS (*ante*, p. 39) followed.

Appeal against conviction.

The appellant was convicted at Hampshire Assizes on July 25, 1952, of the murder of Linda Bowyer, a girl of $5\frac{3}{4}$ years of age, and was sentenced by Cassels J. to death.

The appellant was a Broadmoor patient, and on April 29, 1952, escaped from Broadmoor, being at large from 2.40 p.m. to 6.40 p.m. At 6 a.m. the following day the dead body of Linda Bowyer, aged $5\frac{3}{4}$ years, was discovered. Medical evidence showed that she had died from manual strangulation some 12 to 15 hours previously. She was last seen alive just after 5.30 p.m. on April 29. The appellant's movements during his period of escape were more or less accounted for innocently, except for a period of somewhere between 5.30 p.m. and 6 p.m. On the morning of April 30 the appellant was interviewed by police officers in his room at Broadmoor and questioned by them with regard to his movements during his escape. No caution had previously been administered. The material parts of the questioning and of the appellant's answers appear fully in the judgment.

At the trial Cassels J. admitted evidence tendered by the prosecution of a confession by the appellant that he had manually strangled two other little girls in extremely similar circumstances at Bath on July 15, 1951, and August 8, 1951,

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respectively, on the ground that that evidence was material on the issue of the identity of the murderer of Linda Bowyer.

Henry Elam (*Hugh Park* with him) for the appellant: The substantial ground of appeal is that the evidence of the confession by the appellant of the two earlier murders was wrongly admitted. Cassels J. admitted it on the ground that it was relevant on the issue of the identity of the murderer of Linda Bowyer and also to prove criminal design or intent. It was submitted by the prosecution primarily on the issue of identity. Evidence of similar acts may be admitted, according to the established authorities, to prove system or identity, to negative accident or mistake, to show a course of conduct, or to prove with what intent an act was done. [He referred to MAKIN *v.* ATT.-GEN. FOR NEW SOUTH WALES [1894] A.C. 57, THOMPSON *v.* DIRECTOR OF PUBLIC PROSECUTIONS, 13 Cr.App.R. 61; [1918] A.C. 211, and HARRIS (*ante*, p. 39).] It is submitted, however, that the evidence of similar acts in the present case did not fall within the category of evidence admissible to prove identity. There was, here, no true issue of identity. The appellant's defence at the trial was that he did not kill the child, and a mere plea of Not Guilty does not raise an issue of identity in the sense referred to in the authorities. It is conceded that if the evidence was admissible on the issue of identity, the mere fact that it disclosed other offences by the appellant would not render it inadmissible, and it is further conceded that, if the evidence was legally admissible, Cassels J. judicially exercised his discretion in deciding to admit it.

The second ground of appeal relates to the questioning of the appellant by the police. The Judges' Rules are, it is true, not rules of law in the strict sense, but only rules for the guidance of the police; but if evidence is obtained in breach of the Rules, it is always open to a judge to exclude it. Here the appellant was " in custody " within the meaning of Rule 3 when he was questioned, and no caution had previously been administered. He was not, it is true, in a police station, and probably the Rules did not envisage custody in a Broadmoor

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institution or other custody than police custody, but he was being detained by a superior authority, and the same principle should apply, and the statement made by the appellant, in the absence of a preliminary caution, should not have been admitted.

The Solicitor-General (*Sir Reginald Manningham-Buller, Q.C.*), *G. D. Roberts, Q.C.*, and *J. N. Hutchinson*, for the Crown, were not called on to argue.

SLADE J.: This is an appeal by John Thomas Straffen from conviction before Cassels J. and a jury at Winchester Assizes of the murder of Linda Bowyer, a little girl of $5\frac{3}{4}$ years of age, on Tuesday, April 29, 1952. Two grounds are raised in support of the appeal. The first ground is "that the learned judge was wrong in law in admitting evidence at the trial of the murders alleged to have been committed by the accused at Bath on the 15th July and 8th August, 1951, respectively." That refers to the murders of two other young girls, namely, Brenda Goddard on July 15, 1951, and Cicely Batstone on August 8, 1951. The second ground is "that the learned judge was wrong in law in admitting evidence at the trial of the oral statements made by the accused to Detective-Inspector Francis and Detective-Sergeant Lawson on the 30th April, 1952, while he (the accused) was in custody and without the usual caution being first administered."

I can deal very shortly, first of all, with the second ground of appeal, which is based upon what are known as the Judges' Rules. The Judges' Rules are designed to secure that no advantage be taken of a prisoner who is in custody and whom the police have already made up their minds to charge with the commission of an offence by requiring that in such a case the police shall first administer the usual caution to him before making inquiries of him. Those Rules have no force in law in the sense that answers given by an accused person to any inquiries made in breach of the Rules are inadmissible; it is a matter for the discretion of the learned judge in each case whether, when inquiries are made in contravention of the

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Rules, the answers should be admitted or not. In the present case Cassels J. took the view that the words " in custody " in the Judges' Rules meant " in custody of the police " and did not apply to a Broadmoor patient, and he added that, if they did, it would never be possible to make any inquiries of a Broadmoor patient without first administering the caution. In the opinion of the court, the learned judge was right in exercising the discretion that he did in admitting the evidence of Detective-Inspector Francis and Detective-Sergeant Lawson, and there is no substance in that ground of appeal at all.

The other ground of appeal raises a far more serious point, but one upon which the members of this court have reached a clear conclusion. It is necessary for me to state shortly the facts of the case. On Tuesday, April 29, 1952, the appellant escaped from Broadmoor and he was at large from 2.40 to 6.40 p.m. on that day. At about 6 o'clock on the morning of Wednesday, April 30, the dead body of Linda Bowyer was found in the hamlet or village of Little Farley and her bicycle was found some 200 yards away from the body. She had died from manual strangulation and the medical evidence showed that her death had taken place some 12 to 15 hours previously, which would come within the period during which Straffen was at large. Miss Saxby was the last witness for the prosecution to see Linda Bowyer alive. She said that she had seen her shortly after 5.30 p.m. Straffen was recaptured at 6.40 p.m. His movements were more or less accounted for except for a period of somewhere between 5.30 and 6 p.m. and, having regard to the distances involved, there is no doubt that that time provided him with ample opportunity to commit the crime had he been so minded.

However, the evidence for the prosecution did not stop there. About $2\frac{1}{2}$ hours after the discovery of the dead body of Linda Bowyer on the morning of Wednesday, April 30, Detective-Inspector Francis and Detective-Sergeant Lawson went to the Broadmoor institution, to which Straffen had been taken back upon his recapture the previous evening. Accompanied by

some male nurses they went into Straffen's room, told him that they were police officers, and said that they would like to talk to him about his escape the previous day. Inspector Francis said: "Are you prepared to tell us what you did and where you went?" Straffen proceeded to give an account of some of his movements, and then Inspector Francis said: "Yes, we know all that, but we should like to know what else you did, and if you got into any mischief," whereupon Straffen said: "I did not kill her." I pause there for a moment to say that evidence was called by the prosecution to prove that at no time between 6.40 p.m. on April 29 and the time of this interview, about 8.30 a.m. on April 30, was there any opportunity of Straffen having had access to newspapers or any other possible source of information about a little girl having been killed.

When Straffen said: "I did not kill her," Inspector Francis said: "What do you mean by you did not kill her? There has been no suggestion that anyone has been killed, injured, or in any way attacked." Straffen said: "I know what you policemen are, I know I killed two little children, but I did not kill the little girl." Inspector Francis said: "What do you know of the little girl being killed?" and Straffen again said: "I did not kill her." At that moment Detective-Sergeant Lawson intervened and said: "A little girl was in fact killed quite close to where you were arrested," and Straffen said in reply to that: "I did not kill the little girl with the bicycle." At the time not only had nothing been said about a little girl having been killed, except when it had been mentioned by Detective-Sergeant Lawson a moment or two before, but moreover nothing had been said about a little girl with a bicycle. Following that conversation Straffen was asked, after caution, whether he would like to make a voluntary statement about his movements during the time when he was at large. He said he would and he made such a statement, which was taken down, read over to him in the usual way and signed by him. That written statement was remarkably accurate so far as it

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went and it confirmed the evidence which was given by witnesses for the prosecution, including, in particular, the evidence of the step-father of Linda Bowyer, a Mr. Sims, who testified to having had a conversation with her. In that statement there appeared this: "I saw about four little girls talking in the road not far from the pub. One of the little girls ran into her house crying, the other two went towards the pub"; that is three. "The other one"—and this is clearly Linda Bowyer —"went back to her house and when I looked back she had a bike and was riding up behind me. I heard a man, I think he was from the shop, ask her if her mother was home. I think she said 'Yes.' The man then got into a van which was parked outside the shop. I then walked straight along the road. I turned round again. The girl was not there at all." That clearly refers to Mr. Sims, the step-father, who said he had had such a conversation with his step-daughter at that place. At the end of the statement Straffen said: "I have been shown a photograph by the police officer of a little girl and that is a photo of the little girl who I saw with the bike near the pub and who followed me up the road." Now the photograph so shown to Straffen and identified by him as the fourth of the four little girls to whom I have just referred was a photograph of the deceased girl, Linda Bowyer.

The defence of Straffen was that he did not kill Linda Bowyer. He pleaded Not Guilty and it was for the prosecution to prove their case, and to do that the prosecution were entitled to call any evidence which was admissible in law. At an early stage, in the absence of the jury, they sought the judge's permission to admit evidence of the deaths of two other little girls, namely, Brenda Goddard and Cicely Batstone, who had been murdered at Bath in July and August, 1951, respectively, and they came prepared with evidence which amounted to a confession by Straffen that he murdered those two little girls. Indeed, one of the answers, which I have just read, made by Straffen to the police officers in the present case was: "I know I killed two little children, but I did not kill the little girl."

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Unquestionably the two little children to whom he was there referring were Brenda Goddard and Cicely Batstone. The learned judge, after hearing legal argument, admitted the evidence. The question here is: Was that evidence properly admitted? The ground upon which the evidence was admitted was that it was material to establish the identity of the murderer of Linda Bowyer.

The general rule is that evidence should be excluded which tends to show that the accused has been guilty of criminal acts other than those covered by the indictment, and it is an irrefragable rule that evidence of the commission of criminal offences not covered by the indictment shall not be admitted for the sole purpose of proving that the accused is a person of criminal disposition, or even that he has a propensity for committing the particular type of crime with which he is charged. But, apart from statute, there are certain recognised exceptions to that rule, under which evidence is admissible of other crimes committed by the accused, the reason for its admission being that it tends to prove not that he is a man who has criminal propensities, but that he was the man who committed the particular offence charged.

I take the law upon the point of what evidence is admissible from the well-known case of MAKIN *v.* ATT.-GEN. FOR NEW SOUTH WALES, with which Mr. Elam opened his argument. This passage is found in the judgment of the Board delivered by Lord Herschell ([1894] A.C. 57 at p. 65): "It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question

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whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused." Here the evidence was admitted by the learned judge upon the latter ground, namely, that it tended to rebut a defence which was otherwise open to the accused, that is, that he was not the person who committed the murder.

In dealing with that case in the very recent case, which was before the House of Lords, of HARRIS *v.* DIRECTOR OF PUBLIC PROSECUTIONS, Lord Simon said (36 Cr.App.R. 39 at p. 51): "In my opinion, the principle laid down by Lord Herschell, the Lord Chancellor, in MAKIN'S CASE (*supra*), remains the proper principle to apply, and I see no reason for modifying it." A little later on he said: "It is, I think, an error to attempt to draw up a closed list of the sort of cases in which the principle operates. Such a list only provides instances of its general application, whereas what really matters is the principle itself and its proper application to the particular circumstances of the charge that is being tried. It is the application that may sometimes be difficult, and the particular case now before the House illustrates that difficulty." Then further on, at p. 53, Lord Simon said: "The substance of the matter appears to me to be that the prosecution may adduce all proper evidence which tends to prove the charge"; and at p. 55, after dealing with THOMPSON'S CASE (13 Cr.App. R. 61; [1918] A.C. 221), he said this: "It is the fact that he was involved in the other occurrences which may negative the inference of accident or establish his *mens rea* by showing 'system,' or, again, the other occurrences may sometimes assist to prove his identity, as, for instance, in PERKINS *v.* JEFFERY [1915] 2 K.B. 702. But evidence of other occurrences which merely tend to deepen suspicion does not go to prove guilt."

Now that is the law and the question is whether the evidence in this case falls or does not fall within the category of admissibility as being relevant to prove the crime charged by showing that it was the accused who committed it. The

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grounds upon which the admissibility of the evidence was urged by the Solicitor-General in the court below were the similarity of the death, and of the circumstances surrounding it, in the case of the two Bath murders on the one hand and this Farley village murder on the other. He stated the similarities to be, first, that each of the victims was a young girl; secondly, that each of the young girls was killed by manual strangulation; thirdly, that in each case there was no attempt at sexual interference or any apparent motive for the crime; fourthly, that in none of the three cases was there any evidence of a struggle; and fifthly, that in none of the three cases was any attempt made to conceal the body, although the body could have been easily concealed.

Those similarities were fortified by the medical evidence given by Dr. Gibson, dealing with the murders of Brenda Goddard and Cicely Batstone, and the pathologist, Dr. Teare, dealing with the murder of Linda Bowyer. Referring to the two earlier murders, Dr. Gibson said: "The cause of death was asphyxia due to manual strangulation. (Q) Was there any sexual interference with this little girl?"—that was Brenda Goddard—"(A) None at all. (Q) Apart from the abrasions to her throat, and the laceration on the back of her head, had she sustained any other injuries? (A) Not apart from one or two minor scratches, which might have been caused earlier; there were no other injuries. (Q) On the 9th August"—now coming to Cicely Batstone—"did you go to the field known as The Tumps in Bloomfield Road, Bath? (A) I did. (Q) Did you go along the hedge in that field which is shown in photograph No. 2 of Exhibit 15? (A) Yes. (Q) Did you see a body lying underneath the hedge, as shown in photograph No. 3? (A) Yes. (Q) Did you carry out an examination of the body of that child? (A) I did. (Q) What was the cause of death? (A) Asphyxia, due to manual strangulation. (Q) Had there been any sexual interference with that child? (A) None at all. (Q) I think you were present when a post-mortem examination was made of her body? (A) I was.

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(Q) Were there any injuries to her body, apart from the region of the throat? (A) No. (Q) Comparing the two cases of Brenda Goddard and Cicely Batstone, so far as you could see from an examination of their bodies, had their death been caused in exactly the same fashion, by manual strangulation? (A) Yes. (Q) The only difference between them being that one had a laceration on the back of the head and the other had not? (A) That is so. (Q) Which, in your view, did not contribute to her death? (A) It did not." I pause there to say that that laceration, according to Straffen, was caused by his banging her head up against a stone because the child apparently uttered no cry when he was strangling her. " (Q) In neither case was there any sexual interference? (A) No. (Q) In the case of Brenda Goddard, she was lying along by a wall in a wood? (A) Yes. (Q) So far as you could see, had any attempt been made to conceal her body? (A) None at all. (Q) In the case of Cicely Batstone, her body was lying by a high hedge, was it not? (A) Yes, close to a high hedge. (Q) So far as you could see, had any attempt been made to conceal her body? (A) I do not think so."

Dealing with the evidence as regards Linda Bowyer: " You saw the body of Linda Bowyer? " and Dr. Teare said: " I did." " (Q) Have you studied the depositions, the photographs and the post-mortem reports in the cases of Brenda Goddard and Cicely Batstone? (A) I have." Dr. Teare had not, of course, seen the bodies of those two little girls. " (Q) And did you hear the evidence of Dr. Gibson? " —that is the evidence I have just read—" (A) I did. (Q) In the case of Linda Bowyer did you find many similarities with regard to her death when compared with the deaths of Cicely Batstone and Brenda Goddard? (A) I did. (Q) First of all, of course they were all little girls? (A) Yes. (Q) They all died of manual strangulation? (A) Yes. (Q) In the case of Linda Bowyer, also, there was no attempt at sexual interference? (A) That is so. (Q) In the case of Linda Bowyer also there was no apparent motive, was there?

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(A) No. (Q) So far as Linda Bowyer was concerned, you went to the spot where her body was found? (A) I did. (Q) Was there any evidence of any struggle in that case? (A) I could see none. (Q) And no attempt in that case to conceal the body? (A) None at all. (Q) Would concealment have been fairly easy in that case? (A) It would. (Q) With regard to the case of Linda Bowyer, the case where you did see the body, was there any feature about her death which impressed itself upon your mind? (A) Yes, at the time I was struck by the precision with which this child's death appeared to have been caused. It struck me that the pressure on her neck was determined and applied at exactly the right points, as if by a person with some experience of this method of killing. (Q) The injuries which she sustained were very local in character, were they not? (A) They were. (Q) Do you attach any significance to that? (A) They "—that is, the injuries—" were in contrast to the exaggerated amount of bruising and external injury which one commonly sees in cases of strangulation, even in young children. (Q) From the knowledge you now possess of the death of Cicely Batstone, was the same feature apparent there? (A) Yes, but less marked than in the case of Linda Bowyer."

That evidence with regard to the deaths of Brenda Goddard and Cicely Batstone was tendered and was admitted for the purpose of showing that the same person killed all three little girls, that is to say, that the person who manually strangled Brenda Goddard and Cicely Batstone in those circumstances also manually strangled Linda Bowyer in similar circumstances. In the opinion of the court, that evidence was rightly admitted, not for the purpose of showing, to use Mr. Elam's words, that Straffen was a professional strangler, but for the purpose of showing that Straffen strangled Linda Bowyer; in other words, for the purpose of identifying the murderer of Linda Bowyer as being the same person as the person who murdered the other two little girls in precisely the same way.

I myself see no distinction in principle between this case and THOMPSON *v.* DIRECTOR OF PUBLIC PROSECUTIONS (*supra*),

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to which we were referred, and, indeed, I think one cannot distinguish abnormal propensities from identification. Abnormal propensity is a means of identification. In THOMPSON'S CASE (*supra*) the offence charged was committed on March 16, 1917, and the evidence was that on March 16 an appointment was made by the man who committed the offences with the boys to meet those boys again three days later, on March 19. It was common ground that it was the accused who went to the appointed place on March 19, and he found the police waiting for him. When he was arrested there were found upon him powder puffs, and at his lodgings there were found indecent photographs, all of boys. Evidence was admitted of the powder puffs and of the photographs—to prove that he committed the offence on the 16th, the boys having identified him as being the person and he having set up an *alibi*. The evidence was admitted to prove his identity by showing that he was one of those persons who suffer from the abnormal propensity of homosexuality. I see no distinction in principle at all between that case and this case. It is an abnormal propensity to strangle young girls, without any apparent motive, without any attempt at sexual interference, and to leave their dead bodies where they can be seen and where presumably their deaths would be likely to be rapidly detected. In the judgment of the court, this evidence was admissible because it tended to identify the person who murdered Linda Bowyer with the person who confessed in his statements to having murdered in similar circumstances a year before Brenda Goddard and Cicely Batstone.

Mr. Elam said: How far, then, does the admissibility of such evidence go; does it go to a burglar, housebreaker, thief, and so on? Lord Sumner, in THOMPSON'S CASE (*supra*), pointed out that they were merely examples of persons who fell within the genus of dishonest persons; but, speaking for myself, I think that if the question of identity arose in a case of housebreaking and it were possible to adduce evidence that there was some peculiarity in relation to earlier housebreakings,

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which was apparent also in the case of the housebreaking charged, so as to stamp the accused man not only with the housebreaking charged but with the earlier housebreakings, and there was evidence that he had committed the earlier housebreakings, that would fall within the same principle of admissibility, not to prove his propensity for housebreaking, but to prove that he was the person who committed the housebreaking charged.

The sole ground of this appeal is the question of law with regard to admissibility of the evidence. It is unnecessary, therefore, to consider whether, where evidence is admissible, its prejudicial effect is so disproportionate to its probative value that the learned judge, in the exercise of his discretion, ought not to have allowed its admission. That point does not arise in this appeal, Mr. Elam having very properly conceded that if the evidence was admissible the discretion of the learned judge at the trial was judicially exercised.

In the circumstances this appeal is dismissed.

Appeal dismissed.

PRACTICE NOTE

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Statement by THE LORD CHIEF JUSTICE: Before we pass to the applications, I desire to say that the judges of this court have decided on a change of practice. Hitherto, since the court has been in existence, as a rule, if there is nothing special in the case when leave to appeal is given the court merely announces that leave to appeal is granted. Occasionally it may, and still may, say that leave is granted on some particular ground or for some particular reason. Where applications have been refused, it has been the practice for judges in rotation to deliver short judgments, going through the facts and giving reasons why the application is refused. An application in this court is never refused unless three judges, and generally four, have been unanimous on the point, because all cases, or nearly all cases, are sent to the single judge first. The application

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then comes before this court if the single judge has refused it, and if this court refuses it it means that three judges are unanimous, because the practice has always been that if one judge thinks that leave to appeal should be given, it is given. But what is the point in giving these judgments which have been hitherto given? The only person who is really interested in the matter is the applicant, and he is never present on an application. In most applications the applicant is not represented by counsel. This court has determined that for the future it will approximate its practice to that which prevails in the Court of Appeal in civil cases, where leave to appeal has to be obtained in certain matters, the Appeal Committee of the House of Lords, to whom applications are made for leave to appeal, and the Judicial Committee of the Privy Council, which, certainly when appeals came from India, had many applications in criminal cases. Neither the Court of Appeal, nor the House of Lords, nor the Judicial Committee when refusing an application say more than that the application is refused. In my opinion, it would be a very useful practice that henceforth this court should only say either that the application is granted or the application is refused, unless there is some particular point in the case to which the court desires to draw attention.

Speaking for myself, one reason why I think it is desirable that we should adopt this practice is that occasionally by an oversight, as the case has not been argued, a judge, in giving judgment, lets fall a sentence which perhaps is not strictly accurate in law. There is really no reason to say any more in refusing an application, because no application is refused unless three judges have been unanimous, and nowadays, unless in exceptional cases, four judges have been unanimous. Therefore, we do not propose to say any more in dealing with applications, unless there is some particular point in the application.

Capital cases will hereafter be treated and listed as appeals. They always have been treated as appeals and the prosecution is always represented.

BEFORE

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ROBERT ABRAHAMS

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Sentence—Preventive Detention—Qualifying Conviction—Conviction Followed by Binding Over—Criminal Justice Act, 1948 (11 & 12 *Geo.* 6, *c.* 58), *ss.* 12, 21.

A conviction followed by a binding over, as distinct from a conviction followed by a probation order or an order of absolute or conditional discharge, can be a qualifying conviction, under section 21 of the Criminal Justice Act, 1948, for a sentence of preventive detention or corrective training.

STOBBART, 35 Cr.App.R. 125; [1951] W.N. 508, distinguished.

Application for leave to appeal against sentence.

The applicant was convicted at Somerset Quarter Sessions on July 4, 1952, of shopbreaking and larceny and was sentenced by the Chairman to seven years' preventive detention. One of the qualifying convictions set out in the notice served on the applicant under section 23 of the Criminal Justice Act, 1948, was a conviction of shopbreaking and larceny on March 2, 1943, when the applicant was bound over.

S. Crowther, for the applicant:

The conviction of March 2, 1943, could not be regarded as a qualifying conviction for the purpose of section 21 (2) of the Act, inasmuch as on that occasion the appellant was bound over. The recent decision in STOBBART, 35 Cr.App.R. 125; [1951] W.N. 508, is in point, and the legislature cannot have intended that there should be any distinction between a conviction followed by a probation order and a conviction followed

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by a binding over. Further, a sentence of preventive detention was not appropriate in this case, as the applicant had had a substantial period of honest employment since his last release from prison.

No counsel appeared for the Crown.

McNAIR J.: The applicant was convicted at Somerset Quarter Sessions and sentenced to seven years' preventive detention. He now applies for leave to appeal against sentence. The court has had the advantage of hearing the submissions made on his behalf by counsel and is prepared to grant leave to appeal and to treat this hearing as the hearing of the substantive appeal.

The first point taken by counsel on his behalf is that one of the three qualifying convictions under section 21 of the Criminal Justice Act, 1948, was a conviction on March 2, 1943, of shopbreaking and larceny which should not be treated as a conviction because on that occasion the applicant was bound over and not subjected to any other penalty. It was argued that, accordingly, the case fell within the decision of this court in STOBBART (*supra*). In that case the first qualifying conviction relied on was a conviction where a probation order under the Criminal Justice Act, 1948, was made. Section 12 of that Act provides in terms that a conviction followed by a probation order is not to be treated as a conviction, but the Act makes no such provision with regard to a conviction followed by a binding over. The court has no doubt that a conviction followed by a binding over is a qualifying conviction within the meaning of section 21 of the Act. Accordingly, this was a case in which a sentence of preventive detention could legally be passed. The court, however, having considered the applicant's record and, in particular, the fact that since his release from prison in July, 1949, he has been in employment and has not been before a court, considers that this is a case where it can substitute what it regards as the appropriate sentence, which

is one of four years' imprisonment; but if the applicant again appears before a court, he can expect to receive a sentence of preventive detention.

Sentence varied.

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BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE FINNEMORE AND MR. JUSTICE McNAIR

SIDNEY ARTHUR PEARCE

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Sentence—Attempt to Commit Crime—Common Law Misdemeanour—Substantive Offence Punishable by Limited Term of Imprisonment—Maximum Punishment for Attempt—Criminal Justice Act, 1948 (11 & 12 *Geo.* 6, *c.* 58), *s.* 21 (1).

Although an attempt to commit an offence may technically be a common law misdemeanour, the offender should not be sentenced to a term of imprisonment longer than that to which he would have been liable if he had been convicted of the full offence and, accordingly, where an offence is punishable by a maximum sentence of 12 months' imprisonment, a conviction of an attempt to commit that offence cannot be regarded as a conviction "of an offence punishable with imprisonment for two years or more" within the meaning of section 21 (1) of the Criminal Justice Act, 1948, rendering the offender liable to a sentence of corrective training.

MORRIS, 34 Cr.App.R. 210; [1951] 1 K.B. 394, explained.

Reference by the Secretary of State under section 19 (*a*) of the Criminal Appeal Act, 1907.

The appellant was convicted at the County of London Sessions on February 27, 1951, of attempting to take and drive away a motor-car without the consent of the owner and was sentenced by the Deputy-Chairman to three years' corrective training. He appealed against conviction only, and the appeal was dismissed. Subsequently he petitioned the Home Secretary

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on the ground that he was not liable to be sentenced to corrective training, and the Home Secretary referred the matter to the court.

No counsel appeared.

THE LORD CHIEF JUSTICE: This case has been referred to the court by the Secretary of State.

The circumstances are that the appellant was convicted at the County of London Sessions in February, 1951, and was sentenced to three years' corrective training. Curiously enough, he appealed to this court against his sentence and subsequently abandoned his appeal, so that it never came before the court. He did appeal against conviction, and that appeal was dismissed. Recently he petitioned the Home Secretary and the ground of his petition was that he was not liable to be sentenced to corrective training in circumstances I will mention in a moment. The Home Secretary has referred the matter to the court.

The appellant was convicted of the offence of attempting to commit an offence created by section 28 of the Road Traffic Act, 1930, namely, attempting to take and drive away a motor-car without the consent of the owner, and two previous convictions were proved against him. It was also shown that he had been sent to Borstal, I think on more than one occasion, so that there were at least three previous convictions against him. The magistrates evidently thought, and I can sympathise with their view from one point, that it was a case for corrective training. The difficulty that arises is that under the Road Traffic Act the maximum penalty prescribed for taking and driving away a motor-car without the consent of the owner is 12 months' imprisonment. This court has held, beginning with the case of MORRIS, 34 Cr.App.R. 210; [1951] 1 K.B. 394, that, when a person is convicted of a common law misdemeanour, the sentence is fine or imprisonment at the discretion of the court, and that it is no longer the law that the maximum sentence in such a case is one of two years' imprisonment. As the appellant attempted to commit the offence in this case, he was

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guilty of a common law misdemeanour, but of course it is not right that if a person is convicted only of an attempt to commit an offence, although technically that may be a common law misdemeanour and therefore technically he may be liable to a fine or imprisonment, at the discretion of the court, he should be given a longer sentence for the attempt than he could have been given if he had committed the full offence. If the appellant had not only attempted to drive away the car but had actually driven it away, the utmost sentence he could have received would have been 12 months' imprisonment. He could not have been sent to corrective training for that offence, because it is not an offence punishable with imprisonment for a term of two years or more.

In giving the judgment in MORRIS (*supra*), where the defendant was convicted of conspiracy to smuggle goods, and it was argued that the misdemeanour was not punishable by a longer sentence, it was shown that the smuggling had been going on for a very long time and the conspiracy was one of the most dangerous description. We held, therefore, that Hallett J. was perfectly justified in passing a sentence of four years' imprisonment, but in giving the judgment of the court I said (34 Cr.App.R. at p. 218; [1951] 1 K.B. at p. 399): "Where the evidence showed that the only matter in which the defendant had been concerned was one definite offence, it would obviously be wrong, by means of indicting him for conspiracy, to impose on him a longer sentence than he could have received if he had been indicted merely for the substantive offence." *A fortiori*, that applies to an attempt, and if for the full offence Parliament has laid down a definite period, it is wrong that a longer sentence should be given for an attempt than could have been given for the substantive offence.

As the whole case was referred to us by the Secretary of State, we can deal with it under section 19 (*a*) of the Criminal Appeal Act, 1907, as if it were an appeal, and accordingly direct that the appellant be immediately discharged.

Order accordingly.

BEFORE

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RALPH LESLIE GORDON BOUCHER

Evidence—Wife Called as Witness by Prosecution—Not a Competent Witness at Common Law or by Statute—Conviction Quashed.

Sentence—Corrective Training—Age Limit—Criminal Justice Act, 1948 (11 & 12 *Geo.* 6, *c.* 58), *s.* 21 (1).

Conviction of larceny quashed on the ground that the prisoner's wife, who was not a competent witness either at common law or by statute, had been called by the prosecution to give evidence against the prisoner, the court refusing to apply the proviso to section 4 of the Criminal Appeal Act, 1907.

Corrective training should not, unless in exceptional circumstances, be imposed on an offender whose age exceeds 35, and as a general rule should be imposed only on an offender whose age does not exceed 30.

Appeal against conviction and sentence.

The appellant was convicted at a court of summary jurisdiction at Gloucester of larceny, and was committed for sentence, under section 29 of the Criminal Justice Act, 1948, to Gloucester City Quarter Sessions for sentence. An indictment for another offence of larceny was there preferred against him and on July 30, 1952, he was convicted. He was sentenced by the Recorder to two consecutive terms of two years' corrective training.

At the trial the wife of the appellant, who was not a competent witness either at common law or by statute, was called to give evidence against the appellant by the prosecution. No objection was made by the defence, and no protest was made by the Recorder, who commented on her evidence in his summing-up.

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S. R. Benson, for the appellant:

The appellant's wife was not a competent witness either at common law or by statute, and her evidence should not have been admitted.

[He referred also to the summing-up.]

R. C. Hutton, for the Crown:

It is conceded that the calling of the appellant's wife was wrong, but apart from her evidence, the case against the appellant was overwhelming and the court is invited to consider whether in all the circumstances the proviso to section 4 of the Criminal Appeal Act, 1907, should not be applied.

THE LORD CHIEF JUSTICE: This is a most unfortunate case. The appellant, having been committed by a court of summary jurisdiction was committed, quite properly in view of his character, under section 29 of the Criminal Justice Act, 1948, for sentence at quarter sessions. At quarter sessions an indictment for larceny was also preferred against him. One would have thought it was a pretty clear case of larceny. The prosecutor was a working man who shared the same lodging as the appellant, and he left his property in a suitcase under his bed. The appellant was found in possession of the suitcase. Not content with that evidence, the prosecution, without any objection from the defence, or any protest from the learned Recorder, called the prisoner's wife to give evidence against him, having asked her if she was willing to give evidence, to which she assented. It ought to be known and recognised that a wife cannot be called to give evidence against her husband except in a limited class of case at common law or where a statute specifically provides that she may. The statutory offences are contained in the Schedule to the Criminal Evidence Act, 1898, certain subsequently created offences having been added thereto, and there is also an additional provision in section 28 (3) of the Criminal Justice Administration Act, 1914, which enables a wife to give evidence against her husband on a charge of bigamy. The cases at common law are those of offences against the wife's person such as wounding or attempt

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to murder, and in such cases the wife is not only a competent, but also a compellable, witness.

In this case the wife gave very damning evidence against the appellant, and there can be no real doubt that he was a guilty man, but as the prosecution thought it necessary to call her to support its case, and as the Recorder commented on her evidence to the jury and emphasised it again and again, the court cannot regard this as a case in which the proviso to section 4 of the Criminal Appeal Act, 1907, can be applied.

[The learned Lord Chief Justice then referred to the summing-up and continued:] It is enough to say in this case that the conviction must be quashed. The sentences which were passed were two years' corrective training on the first charge, and two years' corrective training on the second charge, the sentences to run consecutively. This court has already said that corrective training is an inappropriate sentence, unless in exceptional circumstances, for anyone over 35, and that as a general rule it should be passed only on a man whose age does not exceed 30. The consequence is that the conviction and sentence on the indictment must be quashed, and in the case in which the appellant was committed to quarter sessions for sentence the sentence will be altered to one of two years' imprisonment, and an order under section 22 of the Criminal Justice Act, 1948.

One conviction quashed.
One sentence varied.

Solicitors: H. H. Vowles & Co., Gloucester, for the Crown.

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EDWARD PROBERT
ROYSTON JOHN COX
ALAN KENNETH DOWLING
MAURICE CHARLES SMITH
FREDERICK GERALD BASTIN

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Malicious Damage—Notice Board on Common—Removal by Commoners—Sign Directing Route to Building Site—No Proof by Prosecution Board was Lawfully on Common—Powers of Parish Council—By-laws for Prevention of Nuisances and Preservation of Order on Common—Abatement of Trespass—Commons Act, 1899 (62 & 63 *Vict. c.* 29), *ss.* 1 (1), 3, 4—*Malicious Damage Act*, 1861 (24 & 25 *Vict. c.* 97), *s.* 51.

The appellants were convicted of malicious damage to a notice board on a common and its supporting scaffolding. The board, which had been erected pursuant to a resolution passed by the parish council giving permission for its erection, only indicated the name of a firm of building contractors and the route to the building site, which was in the neighbourhood of the common. At the close of the case for the prosecution it was submitted on behalf of the defence that it had not been proved by the prosecution that the board was lawfully on the common, and that accordingly the appellants, who were commoners, were entitled to remove it, but the court overruled the submission.

Held, that the submission should have succeeded and the convictions must be quashed. Section 1 (1) of the Commons Act, 1899, provides that a district council (which by section 4 may delegate its powers of management of a common regulated by a scheme made by it to a parish council) may provide either by a scheme or by by-laws and regulations " for the prevention of nuisances and the preservation of order " on a common, but the council in the present case had no power to authorise the

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placing of a notice board of this kind, which had nothing whatever to do with the common or the preservation of order thereon, on a common. The board having been placed on the common without lawful authority, the commoners were entitled to remove it.

Appeals against conviction.

The appellants were convicted at Somerset Quarter Sessions on July 30, 1952, of malicious damage to a notice board on a common and its supporting scaffolding, contrary to section 51 of the Malicious Damage Act, 1861, and were all conditionally discharged.

A scheme for the regulation of Felton Common in the parish of Winford, Somerset, was made by the Long Ashton R. D. C. on December 2, 1924, and confirmed by the Minister of Agriculture on January 17, 1925. By a resolution dated February 24, 1925, the rural district council, in exercise of powers conferred by section 4 of the Commons Act, 1899, delegated their powers of management of the common to the parish council. By a resolution passed on December 28, 1951, the parish council purported to give permission to Hayes, Ltd., a company who were carrying out works on a building site in the neighbourhood of the common, to erect on the common a board measuring 6 feet by 3 feet, held in position by tubular scaffold poles sunk into the ground. The board had on it the name " Hayes " in large letters, with the word " Contractors " in smaller lettering beneath, and beneath the latter word was a thin arrow pointing in the direction of the building site. On the night of February 25, 1952, the notice board was removed and was found lying on the common 100 yards away from the supports which were bent back, being apparently too firmly fixed in the ground to be pulled out. The appellants, all of whom were commoners, admitted being concerned in the act of damage, their contention being that the placing of the board on the common was a trespass which they, as commoners, were entitled to abate.

At the close of the case for the prosecution it was submitted on behalf of the defence that there was no case to answer,

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inasmuch as no lawful authority for the erection of the board had been shown, but the court overruled this submission.

W. M. Huntley, for the appellants, Dyer, Probert and Smith.

C. M. Lavington, for the appellants, Harris, Cox, Dowling and Bastin.

J. A. Cox, for the Crown.

At the conclusion of the arguments, which are summarised in the judgment, the court stated that all the appeals would be allowed and that the reasons for the decision would be given at a later date.

Oct. 27.—The following judgment was read.

THE LORD CHIEF JUSTICE: These appellants were convicted at the Somerset Quarter Sessions of unlawfully and maliciously damaging a notice board and its supporting scaffolding which had been erected on Felton Common in the parish of Winford in the said county, contrary to section 51 of the Malicious Damage Act, 1861, and were conditionally discharged. They appealed against conviction and on Monday last this court quashed the convictions and we now proceed to give reasons for our judgment.

It was not disputed that the land on which the notice board was placed was a common nor that the appellants, who were all residents in the parish, were commoners and therefore had an interest in the common. By section 3 of the Commons Act, 1899, the management of any common regulated by a scheme made by a district council is vested in the district council, and by section 4 a rural district council may delegate their powers of management to a parish council. A scheme for the regulation of the common was made by the Long Ashton R. D. C. on December 2, 1924, and confirmed by the Minister of Agriculture on January 17, 1925. Section 1 (1) of the Act, which enabled the rural district council to make a scheme, also authorised them to make by-laws and regulations "for the prevention of nuisances and the preservation of order on the

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common." Thereafter the rural district council duly delegated their powers to the parish council by a resolution dated February 24, 1925. It seems that in the winter of 1951 a company called Hayes, Ltd., were carrying out certain works on a building site in the neighbourhood of the common and they applied to the parish council for permission to erect a temporary sign on the common, said to be for the purpose of directing the way to this building site. The parish council purported to give their permission by a resolution passed at a meeting held on December 28, 1951. Thereupon these contractors erected a large board some six feet by three which was held in position by tubular scaffold poles sunk into the ground. The board had a white background and the name "Hayes" was painted on it in large red letters; in smaller lettering underneath the name appeared the word "Contractors" and there was also a thin arrow beneath this latter word pointing in the direction of the building site. It is quite obvious that this board was much more an advertisement than a direction post; it was just the sort of board which builders and decorators so often fix outside buildings or houses where they are at work. The arrow indicated nothing except, we suppose, the direction of the builders' hut or office on the building site. The object or nature of the notice board is immaterial for the decision of this case, though it may be that the commoners object to advertisements being displayed on the common and this may explain the somewhat drastic steps they took to register their disapproval. It seems that on at least two occasions before that which was made the subject of the prosecution the board had been thrown down and after this had happened a second time the supports were rammed deep into the ground, stones were piled round them and the supports themselves were bound round with barbed wire. None the less on the night of February 25, 1952, the notice board was wrenched off or, at any rate, came off in some way and was found lying on the common 100 yards away from the supports which were bent back, though apparently they were too firmly fixed in the ground to be pulled out. All the appellants except

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Smith admitted taking some part in doing the damage and Smith admitted being present when it was done and it was not contended before us that he was in any different position from the other appellants.

As we have said, it was admitted by the prosecution that the appellants were commoners. It was for the prosecution to show that the board and scaffolding were lawfully on the common, as otherwise the placing of it on the common was a trespass which the commoners were entitled to abate. At the close of the case for the prosecution it was submitted that there was no case to answer, because it was said that no lawful authority for the erection of the board had been shown. The Bench ruled against the submission and the case was left to the jury. Succinctly stated, the learned Chairman's direction to them was that, if they thought the defendants acted from a bad motive or, as he put it, that their action was "hooliganism" they should convict, but, if they thought the defendants acted in an honest defence of their rights, they should acquit. In the opinion of this court the sessions were wrong in leaving the case to the jury. It was for the prosecution first to establish that the erection was lawfully on the common. This they sought to do by referring to the provisions of the scheme and the by-laws. Clause 9 of the scheme provides: "The council may, for the prevention of nuisances and the preservation of order on the common, and subject to the provisions of section 10 of the Commons Act, 1899, make, revoke, and alter by-laws for any of the following purposes," inter alia, "(a) For prohibiting or regulating the posting or painting of bills, placards, advertisements, or notices on trees or fences or notice boards on the common," and by-law 5 (the by-laws having been made on February 24, 1925) provides: "No person shall without the consent of the council, post or paint bills, placards, advertisements or notices on trees or fences, or notice boards on the common." It was contended that, as the scheme gave the council power to prohibit and regulate the posting of placards, advertisements and the like, it gave them power to make the by-law to which we have

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referred and by necessary implication gave the council power to permit such things to be placed on the common. But we must see what powers of regulation and management are given to the council by the statute. Section 1 (1) of the Commons Act, 1899, provides that the council of a district " may make a scheme for the regulation and management of any common within their district with a view to the expenditure of money on the drainage, levelling and improvement of the common, and to the making of by-laws and regulations for the prevention of nuisances and the preservation of order on the common." While, therefore, the council may provide either by a scheme or by by-laws for the prohibition of notice boards on the common, they are given no power to authorise the placing of notice boards thereon. They can only make by-laws and regulations for the prevention of nuisances and the preservation of order, not for permitting erections to be placed there. This notice board has nothing whatever to do with the common. It is partly an advertisement for contractors who were working in the neighbourhood and partly a sign to direct persons or vehicles to the site on which they were working. We are unable to find that the council had any right whatever to give the permission which they purported to give for its erection. The cases of ARLETT *v.* ELLIS (1827) 7 B. & C. 346 and DAVIES *v.* WILLIAMS (1851) 16 Q.B. 546, are ample authority for saying that, if an erection is placed on a common without lawful authority, the commoners are entitled to remove it. A good many other contentions were raised in the case and certain sections of the Law of Property Act, 1925, were referred to, but in our opinion this matter entirely depends upon the powers given by the Commons Act to the council. It may be that a notice board could be erected for the prevention of nuisances, that is to say, for warning against the committing of nuisances or prohibiting nuisances, but this notice board has nothing whatever to do with the common or with the preservation of order thereon. Accordingly, we can find no warrant for saying that it was legally there or that the commoners exceeded their rights in removing it.

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Before parting with this case, the court cannot refrain from expressing regret that this occurrence was made the subject of a criminal prosecution. We are told that the company complained to the police and the police started those proceedings. It would have been much better if the company had been left to take civil proceedings if they had been so advised, and in that case they would have been liable for the costs if their proceedings failed. As it is, the costs of the prosecution have to be paid by the ratepayers of Somerset, who also have to pay for the costs of the defence as the appellants were quite properly granted defences under the Poor Prisoners' Defence Act, 1930. The same is true with regard to this appeal. The whole costs, therefore, of the prosecution and the defence have to fall upon the ratepayers, and it does not seem to us that there is any point in ordering the appellants' costs to be paid by the prosecution, because we have already said the police as prosecutors will get their costs from the county and so will the appellants, so it would only be taking money out of one pocket to put into another.

Convictions quashed.

Solicitors : Watson, Cox & Counsell, Bristol, for the Crown.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE PARKER AND MR. JUSTICE HAVERS

FRANK CRABTREE

1952
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Antecedents of Prisoner—Reference to Prisoner's Associates—Right of Defending Solicitor to Obtain Information before Trial—Details of Previous Convictions and Other Antecedent History. Sentence—Lead Stealing and Receiving.

A police officer giving evidence of a prisoner's antecedents after conviction may properly give evidence of the prisoner's general associates, *e.g.*, that he is an associate of convicted

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thieves, provided that the officer confines his evidence to matters that are within his own knowledge.

The court sees no objection to the terms of a Home Office Circular issued in September, 1950, for the guidance of chief constables and police officers which states: "Details of previous convictions should not be given to defending solicitors before trial unless the chief officer of police is satisfied that the solicitor has his client's authority for requesting this information."

The court does not, however, approve a further paragraph of this circular which states: "As regards details of antecedent history other than convictions the Secretary of State suggests that there is no reason why this should be given," as it is of opinion that it may be proper to communicate to the defence a statement that a prisoner has a bad character through being known as an associate of thieves and so forth.

Observations on severe sentences being necessary for offences of stealing and receiving lead.

Appeal against sentence.

The appellant was convicted at Preston Quarter Sessions on July 10, 1952, of receiving lead stolen from roofs and garage-breaking and larceny, and asked to have an offence of larceny of a motor-car taken into consideration. He was sentenced by the Chairman to nine years' imprisonment.

Dorothy K. Dix, for the appellant.

No counsel appeared for the Crown.

THE LORD CHIEF JUSTICE: The appellant was convicted of receiving 4 cwt. of lead which was stolen from roofs. He was tried at Preston Quarter Sessions for that offence together with an offence of garage-breaking and stealing a quantity of heavy-weight tyres, and he also asked to have taken into consideration the theft of a motor-vehicle, and he received a sentence of nine years' imprisonment.

Questions have been raised in this case with regard to the propriety of certain evidence which was given by the police after conviction and also with regard to the Home Office Circular which was issued in September, 1950, for the guidance

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of chief constables and police officers generally with regard to giving evidence of previous history and character.

The circular starts by giving certain suggestions of the degree of proof and the nature of the evidence that the officer should be prepared to give. It states that those suggestions were put forward with my approval, and nobody seeks to say they were in any way incorrect or wrong. The circular then goes on to say: "It appears that as a rule the courts are willing to receive information about the offender's general reputation and associates, if this is relevant to the offence of which he has been convicted, but every care should be taken to ensure that this opinion is based on a reasonable foundation of fact. As a general rule this information should not appear on the officer's proof and should not be volunteered unless the question is asked or allowed by the court. The officer giving evidence should be in possession of any further information that the police may have about the offender in order that he may supplement his evidence if necessary."

That is a perfectly accurate and proper description of the situation. This court has said that a court may properly receive evidence with regard to the prisoner's general associates, and so forth, because unless the police can give evidence of that sort, the court does not know whether it is dealing with a man who has committed one offence but has otherwise been leading a reputable life or whether it is dealing with a man who has been habitually associating with criminals. We have often pointed out that it is desirable for a police officer to say "This man is an associate of criminals," convicted thieves, if you like, as long as he is not speaking wildly or generally but is speaking of matters which are within his knowledge. It is obviously desirable that when a court has to pass a sentence on a prisoner they should be informed by the police of his general habits and associates. If a police officer can say: "I know that this man is an associate of thieves and safe-breakers, and I know he is an associate because I know him well, I have often seen him in their company, and I know he keeps their company, and I can give the names of the people with whom he associates and, if

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necessary, their convictions," that is evidence which a court can properly take into account in assessing the sentence. That shows that the police officer is speaking to facts and not merely to stories he may have heard. He can say: "I know this man; and I have seen him habitually in the company of A, B and C, and A, B and C are all thieves who have been convicted as such." There is no objection, therefore, to that.

The circular then goes on: "Applications are occasionally received from solicitors acting for the defence that the police should before trial disclose details of their client's previous convictions and past records generally; and the question whether this information should be disclosed has been raised from time to time. Although this is a matter in which chief officers of police must exercise their discretion, the Secretary of State is of opinion that details of previous convictions should not be given to defending solicitors before trial unless the chief officer of police is satisfied that the solicitor has his client's authority for requesting this information." Generally the solicitor would be well advised to find out from his client before the trial whether his client has a previous record, because otherwise counsel may be instructed in such a way that he may unwittingly let in his client's conviction. It is therefore desirable, no doubt, that the solicitor should know if the client for whom he is appearing has previous convictions. No objection can be taken to the warning of the Secretary of State that the police officer should be sure that the solicitor has his client's authority for requesting information. Solicitors, when they are appearing for men committed for trial, would be always well advised to ascertain whether or not their clients have a blameless record because then, if counsel can be informed that his client is a man of blameless character, the defence will be conducted in one way, whereas if he knows that his client has a record, he will be very careful not to ask questions which will let that record in.

There is one other paragraph of which the court feels bound to say that it does not approve: "As regards details of antecedent history other than convictions the Secretary of State

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suggests that there is no reason why this should be given." We think that if the officer who is going to give evidence is going to say if asked, although it is not to be contained in the first version he puts before the court, that the man has a bad character through being known as an associate of thieves and so forth, that ought to be communicated to counsel for the defence, because counsel may then want to take his client's instructions whether the evidence the police officer is going to give is disputed or not by the prisoner. In the present case if the appellant had instructed his counsel to dispute this evidence, counsel could, though it would have been an unwise thing to do, have cross-examined the police officer. The police officer would then no doubt have mentioned all the different people—because I have a note here of who they were—with whom the appellant was associating and what their history was at the time when he was associating with them. We shall suggest to the Secretary of State that the circular should be altered in some particulars with regard to evidence before sentence.

We now have to consider whether a sentence of nine years' imprisonment was proper to pass on the appellant. He has been convicted of receiving 4 cwt. of lead stolen from roofs. That is a very serious offence, and this court has constantly called attention to the fact that this offence is rampant at the present time. The damage it does is very great. Lead is stripped off roofs, perhaps rain comes on and the whole factory, building or house may be flooded by rain and an enormous amount of damage done. The reason why lead is being stripped from roofs in quantities at the present time is because lead is a very valuable commodity in these days. It fetches a considerable sum of money, and it is a temptation no doubt to thieves, and if thieves are convicted of this offence it is right that they should receive severe punishment.

Our attention is called here to the fact that one of the thieves was sentenced only to two years' imprisonment, but the fact that his sentence may have been too light is no reason why

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the appellant, who received the lead, should not receive a substantial sentence. He was arrested for the offence of receiving in April, and he was committed for trial on May 5, and was granted bail. Then, the usual thing when a man with a record is granted bail happened. On May 28, while he was on bail, he was arrested and was afterwards convicted of false pretences —and was sentenced to nine months' imprisonment at Blackpool Sessions in July. While he was awaiting trial, he was again bailed and on June 16 was arrested for a serious case of garage-breaking and stealing heavy-weight tyres to the value of £380.

The appellant is 41 years of age and had several convictions for dishonesty up to December, 1941, when he was sentenced to six months' imprisonment for thefts from motor-vehicles. He kept out of trouble after that conviction till 1948. He was then fined £105 for offences in connection with motor-spirit and also for obstructing the police in connection therewith. In 1950 he was conditionally discharged at Leeds Assizes for warehouse-breaking, and that conviction would be disregarded for the purpose of considering his previous record under the statute but for the fact that he now admits that in September, 1951, that is to say, within the 12 months during which the conditional discharge was running, being bailee of a motor-vehicle he stole it. His general character is shown by the fact that he has no fewer than 70 convictions for different motoring offences. He has had his licence indorsed at different times. He has been four times disqualified, twice convicted of driving while disqualified, and on seven occasions of driving an uninsured motor-vehicle. He is obviously a man on whom the sessions were justified in passing a severe sentence, but this court thinks that on the whole nine years was too much, considering that he had not had any long sentence, and, with some hesitation, has decided to reduce the sentence to one of seven years.

Sentence reduced.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE PARKER AND MR. JUSTICE HAVERS

ROBERT HENRY WALHEIN

1952
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Jury—Threatened Disagreement—Direction by Judge.

On the return into court of a jury, who had retired to consider their verdict, one of the jurors intimated to the judge that the jury were finding difficulty in arriving at a verdict. The judge then directed them: "You are a body of 12 men. Each of you has taken an oath to return a true verdict according to the evidence, but, of course, you have a duty not only as individuals, but collectively. No one must be false to that oath, but in order to return a collective verdict, the verdict of you all, there must necessarily be argument, and a certain amount of give and take and adjustment of views within the scope of the oath you have taken, and it makes for great public inconvenience and expense if jurors cannot agree owing to the unwillingness of one of their number to listen to the arguments of the rest. Having said that, I can say no more. If you disagree in your verdict in relation to one or other of these men, you must say so."

Held, that the direction was a proper one.

MILLS (1939) 27 Cr.App.R. 80, distinguished.

Appeal against conviction.

The appellant was convicted at the Central Criminal Court on June 30, 1952, of conspiracy to utter forged notes, and was sentenced by the Commissioner to 15 months' imprisonment and recommended for deportation.

The case is reported solely on the direction by the Commissioner to the jury when a disagreement was threatened, which is set out in the headnote.

P. Solomon, for the appellant.

Maxwell Turner, for the Crown.

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THE LORD CHIEF JUSTICE: The appellant was convicted before the learned Commissioner at the Central Criminal Court of conspiracy to utter forged notes. The first complaint made was that, after the jury had returned, a juror told the Commissioner: "I cannot in my own mind find him guilty of the charge which prosecuting counsel have not proved." The Commissioner then said: "You are a body of 12 men. Each of you has taken an oath to return a true verdict according to the evidence, but, of course, you have a duty not only as individuals, but collectively. No one must be false to that oath, but in order to return a collective verdict, the verdict of you all, there must necessarily be argument, and a certain amount of give and take and adjustment of views within the scope of the oath you have taken, and it makes for great public inconvenience and expense if jurors cannot agree owing to the unwillingness of one of their number to listen to the arguments of the rest. Having said that, I can say no more. If you disagree in your verdict in relation to one or other of these men, you must say so." In our opinion, that was a perfectly satisfactory direction. Jurors often have to be reminded that the case may be one in which some of them may start by taking one view and then, finding that the others are against them, may talk the matter over, subordinate their views to those of the majority and concur in the verdict. That is the only way in which juries can arrive at verdicts. We cannot inquire into what goes on in the jury room. The direction given in this case was, in our view, very different from the direction in MILLS (1939) 27 Cr.App.R. 80, with which the Court of Criminal Appeal did not agree. It approximated to the summing-up of Finlay J. in KLEIN (1932) 23 Cr.App.R. 185 [where the case was reported on another point], referred to by the court which decided MILLS (at p. 81n.) and approved by it. The fact that Finlay J. in KLEIN (*supra*) referred to "grave inconvenience and expense," as did the Commissioner in the present case, was not a threat to the jury, but merely pointed out to them the desirability of arriving at a verdict if they could. If they fail to agree, inconvenience and expense

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is caused not only to the prosecution, but also to the defendant, who will have to be tried a second time. [The learned Lord Chief Justice then referred to certain criticisms of the summing-up and continued:] In our opinion, there was ample evidence on which the jury were entitled to convict and no fault can be found with the summing-up. The appeal is dismissed.

Appeal dismissed.

Solicitors: H. W. Pegden & Co., for the appellant; The Solicitor, Metropolitan Police, for the Crown.

CIRCUIT CASE (WESTERN CIRCUIT)

BEFORE

MR. JUSTICE DEVLIN

R. *v.* MILLER AND OTHERS

1952
July 11, 14, 15, 16

Evidence—Character of Prisoner—Question by Counsel for One Prisoner Involving Character of Co-Prisoner—Duty of Counsel —Application for Discharge of Jury and Retrial.
Separate Trial—Charge of Conspiracy.

The principle that any question relating to the character of a prisoner is usually inadmissible as being irrelevant applies equally to a question asked by counsel for a co-prisoner as to a question asked by counsel for the prosecution. If in any case such a question put by counsel for a co-prisoner is admissible as being relevant in the particular circumstances, such counsel should show, as far as possible, the same restraint as would be shown by counsel for the prosecution, and should confine his questions to what is strictly required for the purpose of his case. Further, counsel in such circumstances should first inform counsel for the co-prisoner whose character is to be involved that he intends to put the question.

A, B and C were indicted on a charge of conspiracy to evade Customs duties on the importation of nylon stockings. B's

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defence was that he had not been concerned in the importations and that C, who was his employee, had masqueraded as B and used B's office for the purpose of the importations. B's counsel asked a Crown witness in cross-examination whether he was aware that C was in prison during a period when the importations had temporarily ceased. C's counsel then applied for the discharge of the jury and for a fresh trial on the ground that the question put by B's counsel ought not to have been asked as being greatly prejudicial to the trial of C.

Held, that the question put by B's counsel was, in the circumstances, relevant and admissible, and that the joint trial should continue.

Cases must be rare in which the interests of justice will permit a prisoner charged with conspiracy being granted a separate trial from his fellow-conspirators.

Trial at Hampshire Assizes before Devlin J.

Alfred Miller, Nathan Mercado and Leonard Harris were charged on an indictment which alleged that between January 1, 1949, and October 6, 1951, they conspired together and with other persons fraudulently to evade duties of Customs payable on the importation of nylon stockings. At the trial evidence was tendered by the Crown of 21 importations at various dates within the relevant period, the case for the prosecution being that Miller started the illegal importations, conspiring with members of crews of ships which docked at Southampton, and that later Harris and Mercado joined him in the conspiracy. Between November 28, 1949, and September 16, 1950, Harris had served a sentence of imprisonment for an offence not connected with the present indictment, and there had been no illegal importations during that period. Mercado's defence was that he was not concerned in the illegal importations and that Harris, who was an employee of his, had masqueraded as Mercado and used Mercado's office for the purpose of the importations. Mercado's counsel put a question in cross-examination to a Crown witness, asking whether the witness was aware that Harris was in prison during the aforementioned period. Harris' counsel then applied for an order that the jury be discharged from giving a verdict, and the trial

be started afresh, on the ground that the cross-examination was improper as being gravely prejudicial to Harris' case.

G. D. Roberts, Q.C., and *S. A. Morton*, for the Crown.

John Maude, Q.C., and *J. N. Hutchinson*, for the defendant Miller.

Edward Wooll, Q.C., H. H. Edmunds and *H. A. C. C. Hobbs*, for the defendant Mercado.

Bernard Gillis and *R. I. Gray*, for the defendant Harris.

DEVLIN J.: The fundamental principle, equally applicable to any question that is asked by the defence as to any question that is asked by the prosecution, is that it is not normally relevant to inquire into a prisoner's previous character, and, particularly, to ask questions which tend to show that he has previously committed some criminal offence. It is not relevant because the fact that he has committed an offence on one occasion does not in any way show that he is likely to commit an offence on any subsequent occasion. Accordingly, such questions are, in general, inadmissible, not primarily for the reason that they are prejudicial, but because they are irrelevant. There is, however, this difference in the application of the principle. In the case of the prosecution, a question of this sort may be relevant and at the same time be prejudicial, and, if the court is of the opinion that the prejudicial effect outweighs its relevance, then it has the power, and, indeed, the duty, to exclude the question. Therefore, counsel for the prosecution rarely asks such a question. No such limitation applies to a question asked by counsel for the defence. His duty is to adduce any evidence which is relevant to his own case and assists his client, whether or not it prejudices anyone else.

Accordingly, the question which I have to ask myself in the first instance is whether it was relevant to inquire where Harris was at a certain period of time. The answer is, in my opinion, that it was relevant, and, indeed, no real objection has been taken on that ground. It was plainly relevant to the

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case which was being developed on behalf of the accused Mercado—that the time when the conspiracy was, as he says, quiescent was a time when Harris was unable to take part in it. So far no real evidence has been adduced, but the question indicates what I presume will be the case, that counsel for Mercado will seek to tender proof of where Harris was at the relevant period, and what I am doing, in effect, is determining whether evidence of that character is admissible or not. For the reasons that I have given I think it is relevant, and, therefore, admissible.

Although there was no irregularity in the form of the question under consideration, I have dealt with it in this way to make clear for the purpose of the future conduct of the trial how far my ruling goes. First, it does not open the field to any question of this kind by counsel for a prisoner against the character of another prisoner. It is admissible in the present case because it happens to be relevant. In the ordinary way the character of a prisoner is no more relevant at the hands of the defence than it is at the hands of the prosecution. Secondly, while counsel for the defence is not bound by the same considerations of restraint that would affect counsel for the prosecution in such a matter, care ought to be taken not to go any further than is strictly necessary for the proof of the relevant point on which the defence desires to rely. In such a matter the court is very much in the hands of counsel. I have indicated that at this stage proof of where Harris was at a given period during the conspiracy appears to me to have relevance, but I think that counsel for the defence ought to follow, so far as possible in the very different circumstances of appearing for the defence, the same restraint as counsel for the prosecution would, and ought not to introduce material of this sort further than is necessary or unless it is strictly required for the purpose of his case. Thirdly, I think that any question of this sort that is being asked by counsel for one prisoner that will affect another prisoner ought to be communicated to counsel for the other prisoner in advance, so that he may consider whether he desires to take any objection to it.

The cases on which counsel for Harris relied do not, in my judgment, assist him. They were cases in which there was an irregularity in the conduct of the case by the prosecution. The evidence of previous character was irrelevant and inadmissible, but it had slipped out in some way, sometimes through the fault of the witness, sometimes through the fault of counsel, and, therefore, it made the conduct of the prosecution's case irregular. Where such an irregularity exists, a new trial will generally be granted, and the jury will be discharged. Here there is no irregularity, and if I were simply to discharge the jury and start the trial all over again the same results would necessarily follow, since the question that has been put could be put again. Therefore, the essence of the application is not the discharging of the jury on the ground of irregularity, but an application for a separate trial. The considerations which I apply to that are just the same as if counsel for Harris, having been forewarned of the nature of the defence which was to be advanced on behalf of Mercado, had made the application at the beginning of the case.

On such an application one of the matters taken into consideration is the possibility that one co-defendant may raise a defence which reflects on another co-defendant and involves an attack on his character, and for this purpose I will treat the question that is being asked as having the same effect as if it were an attack on Harris' character, though it is primarily made, not for that purpose, but to prove where he was at a given moment. I do not draw any distinction on that ground. The recent cases in which this matter has been considered—I have in mind in particular GRONDKOWSKI AND MALINOWSKI (31 Cr.App.R. 116; [1946] 1 K.B. 369)—show that that possibility is only one of the elements that has to be taken into consideration in determining whether there should or should not be a new trial. In each case one has to consider what the interests of justice require, and, as Lord Goddard C.J. pointed out, in GRONDKOWSKI AND MALINOWSKI (at pp. 120 and 372 of the respective reports), the interests of justice are not necessarily the same as the interests of the prisoner.

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The fundamental thing, to my mind, about the present case is that it concerns a charge of conspiracy, that it alleges—and there is prima facie evidence to support the allegation—that Mercado and Harris were engaged in a common enterprise and were fellow-conspirators. The cases must be rare in which fellow-conspirators can properly in the interests of justice be granted a separate trial. The fact that, as is plain, one accused person desires to throw blame on the other, that Mercado desires to suggest that Harris was, in effect, using the facilities which were provided by his office, unbeknown to him (Mercado), to conduct an illegal enterprise, and that Mercado was innocent, suggests the difficulty which could arise if separate trials were granted. Take the case of two prisoners, A and B, who are said to have been engaged in a common illegal enterprise, and one desires to say that he was made use of by the other, that he was innocent and was misled. If a separate trial be granted, the result would be that in the first case the prisoner A might go into the witness-box and give evidence of all sorts of things said by B and of the conduct of B which would pass necessarily without any denial, and might represent B as being a man of obvious criminality, and the result would be that the jury, hearing only A's side and not B's, might think it proper to acquit A. Then the trial of B takes place before another jury and the same procedure happens in reverse, and the jury in that case might think it proper to acquit B. The result of granting a separate trial might, therefore, be that there was a miscarriage of justice. And the same result would, I think, apply if one assumes, contrary to the assumption that I have made, that one of the prisoners is innocent. The result might be that the jury in such a case, hearing only the innocent prisoner and not having had the advantage of seeing the other prisoner, not being able to form any opinion about his character, not hearing him cross-examined, might come to the conclusion that there was not enough in the story that they had heard, in the absence of hearing the other side and of it being tested, to justify an acquittal.

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I think that in charges of this sort justice ordinarily requires that the whole matter should be tried as one case, and that it needs a very strong and exceptional case before it is split up into two separate trials. If separate trials were to be ordered as a matter of course simply because one prisoner proposed to attack the character of another, then a separate trial, and the possible advantages in the case of the guilty prisoner, could always be obtained simply by the threat that one prisoner proposed to attack the character of his fellow-prisoner. I have, therefore, given the main weight to that consideration. I have not ignored the desirability, where it is possible, of excluding these matters from mention in the presence of the jury. But on balance, I am of opinion that I should not have granted a separate trial if an application had been made at the beginning of the case. The same principles apply now, and I do not grant a separate trial. Accordingly, the application fails and the trial will proceed with the prisoners as at present in charge of the jury.

Application refused.

Solicitors: Solicitor for Customs and Excise, for the Crown; Canter, Hellyar & Co., for the defendants Miller and Harris; Bieber (A.) & Bieber, for the defendant Mercado.

[CENTRAL CRIMINAL COURT]

BEFORE

MR. JUSTICE DONOVAN

R. *v.* BATES AND ANOTHER

1952
Sept. 23

Share Pushing—Making of Misleading Forecast—"Reckless"—Whether Dishonesty Necessarily Involved—Prevention of Fraud (Investments) Act, 1939 (2 & 3 *Geo.* 6, *c.* 16), *s.* 12 (1).

By section 12 (1) of the Prevention of Fraud (Investments) Act, 1939: "Any person who, by any statement, promise or

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forecast which he knows to be misleading, false or deceptive, or by any dishonest concealment of material facts, or by the reckless making of any statement, promise or forecast which is misleading, false or deceptive, induces or attempts to induce another person—(a) to enter into or offer to enter into—(1) any agreement for, or with a view to, acquiring, disposing of, subscribing for or underwriting securities . . . shall be guilty of an offence."

The word " reckless " in the above subsection is to be given its ordinary meaning and is not restricted to recklessness involving dishonesty.

Where, therefore, in an indictment under the above subsection there was included a third count, the particulars of which alleged that defendants " attempted to induce persons to enter into agreements for acquiring ordinary shares in S., Ltd., by the reckless making of a forecast which was misleading and deceptive," as an alternative to two other counts, the particulars of which alleged attempts to induce, respectively, by dishonest concealment of material facts and by making a forecast which the defendants knew to be misleading, false and deceptive,

Held, that the third count was properly included.

Motion to quash a count in an indictment.

Harry Noel Bates and Charles Frederick Russell were charged at the Central Criminal Court before Donovan J. on an indictment alleging offences under section 12 (1) of the Prevention of Fraud (Investments) Act, 1939. In the first count the statement of offence alleged fraudulently attempting to induce persons to invest money, the particulars of offence being that between April 1, 1945, and November 30, 1945, in a certain letter they attempted to induce persons to enter into agreements for acquiring ordinary shares in Specialloid, Ltd., by the dishonest concealment of material facts. In the second count the statement of offence was the same, and the particulars of offence alleged that between the same date in the same letter the defendants attempted to induce persons to enter into similar agreements by a forecast which they knew to be misleading, false and deceptive. In the third count the statement of offence was the same, and the particulars of offence alleged that between the same dates in the same letter the defendants

attempted to induce persons to enter into similar agreements by the reckless making of a forecast which was misleading and deceptive. In opening the case, counsel for the prosecution stated that count 3 was alternative to counts 1 and 2, but, unlike those counts; did not involve dishonesty. For the defendants it was contended that " reckless " in section 12 (1) should be construed as involving recklessness amounting to dishonesty, and that, on the interpretation of the word " recklessly " relied on by the Crown, the count did not disclose an offence known to the law and should, therefore, be quashed.

The Solicitor-General (*Sir Reginald Manningham-Buller, Q.C.*), *R. C. Vaughan, Q.C., Neville Faulks* and *P. M. Syrett*, for the Crown.

Gerald Gardiner, Q.C., and *Sebag Shaw*, for the defendant Bates.

F. H. Lawton and *R. Day*, for the defendant Russell.

DONOVAN J. : Objection is taken on behalf of each defendant to count 3 in the indictment. It is contended that, in view of the Solicitor-General's avowal that the word " reckless " in that count does not necessarily connote dishonesty, the count alleges an offence unknown to the law and should be quashed. Section 12 (1) of the Prevention of Fraud (Investments) Act, 1939, under which the charge is laid, provides : " Any person who, by any statement, promise or forecast which he knows to be misleading, false or deceptive, or by any dishonest concealment of material facts, or by the reckless making of any statement, promise or forecast which is misleading, false or deceptive, induces or attempts to induce another person [to invest money] . . . shall be guilty of an offence . . . ." Counts 1 and 2 of the indictment allege against each of the defendants the dishonest concealment of material facts and the making of a statement which each knew to be misleading, false or deceptive. Count 3 reads thus : " Statement of Offence : Recklessly attempting to induce persons to invest money, contrary to section 12 (1) of the Prevention of Fraud (Investments)

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Act, 1939. Particulars of offence: [Bates and Russell] on a day between April 1, 1945, and November 30, 1945, in the county of London, in a letter headed 'Joseph Sebag & Co., Statistical Department,' dated November, 1945, attempted to induce persons to enter into agreements for acquiring ordinary shares in Specialloid, Ltd., by the reckless making of a forecast which was misleading and deceptive, namely, that the directors of Specialloid, Ltd., anticipate that the profits for the year ended March 31, 1946, should not be less than those shown in the auditors' report for the preceding year, namely, £65,349, before charging income tax."

The Solicitor-General, in opening the case, said that count 3 was an alternative to counts 1 and 2, in the sense that it would be possible to convict under count 3 even if each defendant were acquitted under counts 1 and 2, for counts 1 and 2 obviously involved charges of dishonesty, whereas count 3 did not. A man, it was said, might make a forecast which was false, misleading, and deceptive, through recklessness falling short of dishonesty. In the present case he (the Solicitor-General) would be content, in supporting count 3, to allege such recklessness. Even though it fell short of dishonesty, such a case, he argued, is still caught by the words of section 12 (1). That view is challenged on behalf of each defendant, and it is said that, unless the prosecution allege recklessness amounting to dishonesty, count 3 has no legal basis, and since no such allegation is made, that count is bad and ought to go. The issue which this argument raises is purely one of construction of section 12 (1), and, in particular, the construction of the passage "the reckless making of any statement, promise or forecast which is misleading, false or deceptive."

The rival constructions of this passage appear from what I have already said. Counsel for Bates contends that one, at least, of the meanings of the word "reckless" in this context is careless whether the statement be true or false, and he quotes the speeches of Lord Bramwell and Lord Herschell in DERRY *v.* PEEK (1889) 14 App.Cas. 337 to the effect that a man who makes a statement, careless whether it be true or false, and

induces another to act on it to the latter's detriment, would be guilty of fraud so as to make him liable to an action for deceit. Lord Bramwell, in particular, says (at p. 350):

> " . . . a man who makes a statement without care and regard for its truth or falsity commits a fraud. He is a rogue. For every man who makes a statement says ' the truth is so and so, and I know it or believe it.' "

So, it is argued that the word " reckless " in section 12 (1) should be construed in the same sense, that is, as meaning, and meaning only, a statement made by a person careless whether the statement be true or false, and, therefore, dishonest. This is purely a question of the construction of section 12 (1), in which the word " reckless " finds its setting. Obviously I am not constrained by what was said in DERRY *v.* PEEK (*supra*) to decide that in section 12 (1) the word connotes only something dishonest, and it is not suggested that I am.

DERRY *v.* PEEK (*supra*) was an action for deceit, to succeed in which the plaintiff had to establish fraud, and the House of Lords said, among other things, that a statement made recklessly—that is, without belief in its truth—would be fraud for that purpose. They contrasted such a statement with one made recklessly, but with belief in its truth, which could not be fraud. Obviously the word " reckless " may be used as connoting something entirely free from any moral stigma. It is, however, said that it is not so used in section 12 (1), but is used only in the sense that Lord Bramwell used it in DERRY *v.* PEEK (*supra*), that is, dishonest or fraudulent, and the reasons are these. First, the long title to the Act proclaims as one of its purposes

> " . . . to make general provision for preventing fraud in connection with dealings in investments. . . ."

Secondly, the cross-heading which immediately precedes section 12 (1) reads thus:

> " General provisions for the prevention of fraud."

Thirdly, the marginal note to the section is:

> " Penalty for fraudulently inducing persons to invest money."

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I agree that the long title is a legitimate aid to the construction of section 12 (1), and I take the same view, in this case, of the cross-heading. When Parliament proclaims what the purpose of an Act is, it would be wrong to leave that out of account when construing the Act—in particular, when construing some doubtful or ambiguous expression. In many cases the long title may supply the key to the meaning. The principle, as I understand it, is that where something is doubtful or ambiguous the long title may be looked to to resolve the doubt or ambiguity, but, in the absence of doubt or ambiguity, the passage under construction must be taken to mean what it says, so that, if its meaning be clear, that meaning is not to be narrowed or restricted by reference to the long title. I take the same view about the cross-heading. Instances, indeed, abound where Parliament, proclaiming in an Act that its purpose is to prevent people doing such and such a thing, has caught people who never had any intention of doing it. The patch, in other words, has been larger than the hole. A neat example is section 21 of the Finance Act, 1922, which has been held to apply to persons altogether innocent of the mischief which Parliament said it intended the section to prevent. The section has frequently come under review in the House of Lords without that construction ever being questioned by their Lordships.

The marginal note I reject as a guide to construction. As I said during the argument, it is not the subject of debate or amendment in Parliament, and it follows that during the passage of a Bill amendments may be made to a clause which extend its effect beyond the scope of the marginal note, which, nevertheless, remains unamended. The note, therefore, would then become actually misleading if used as a guide to construction. I might point out that in section 12 of the Act of 1939, the marginal note gives no indication that a fraudulent *attempt* to induce people to invest is an offence. It refers only to the completed act of inducing.

The vital question is: Is there such an ambiguity or doubt about section 12 (1) in this particular respect that I ought to

restrict the meaning of the word " reckless " by reference to the long title and the cross-heading? In other words, although " reckless " may mean " careless, but without dishonesty," am I to say that the word does not bear that meaning here? If one analyses section 12 (1), it is found to deal with three categories of persons who have induced or attempted to induce other persons to invest money. The first is the person who makes a statement which he knows to be misleading, false or deceptive; the second is the person who dishonestly conceals material facts; and the third is the person who recklessly makes a statement, promise, or forecast which is misleading, false, or deceptive. Categories 1 and 2 obviously refer to persons who are dishonest, but, after referring to a person who has knowingly made a false statement or has dishonestly concealed material facts, the legislature, introducing its third category by the disjunctive " or," changes its language altogether. It does not specify a person who knowingly makes a misleading, false, or deceptive statement, promise, or forecast, or dishonestly makes it. It simply specifies a person who recklessly makes these things.

It is admitted that, if the arguments to which I have listened are right, the word " reckless " means and means only, something dishonest. If that be so, why did Parliament not use that word as it had done in the line immediately before? Am I to say that the change of words involves no change of meaning? The ordinary meaning of the word " reckless " in the English language is " careless," " heedless," " inattentive to duty." Literally, of course, it means " without reck." " Reck " is simply an old English word, now, perhaps, obsolete, meaning " heed," " concern," or " care." In accordance with the accepted principles of construction I ought to give that meaning to the word, and, therefore, include that recklessness which is not dishonest, unless it is clear that in section 12 (1) it bears a restricted meaning. On what grounds can I say that that is clear? Because, says counsel for Bates, the long title and cross-heading apart, Parliament cannot have

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intended that recklessness which would not even have supported a civil action for deceit should amount to a criminal offence carrying a maximum penalty of seven years' imprisonment, and because, says counsel for Russell, Parliament cannot have intended to treat alike dishonest rogues and persons who were honest, but careless. Those are cogent arguments. Against them there is this important consideration. The first two things with which section 12 (1) deals are false statements of fact and dishonest concealment of facts. It is not a difficult matter to decide in any given case whether a false statement of fact is false to the knowledge of him who makes it, nor whether a concealment of facts is dishonest. But then the section goes on to deal, among other things, with forecasts which are misleading, false or deceptive. The case of a forecast seems to me to be a different matter. A man may say: "I expect the profits to go on increasing, or to be not less than last year," or: "I expect the value of the company's land and property to appreciate considerably." Those forecasts may turn out to be falsified by the events. How, in the majority of cases, could one prove that they were made dishonestly, even if such were the case? There would, I suppose, be glaring cases where it could be done, but such are the vicissitudes of human affairs, and their reaction on trade and business, that forecasts such as I have instanced might be made quite honestly, although they turned out to be unjustified. Obviously, therefore, it might be very difficult to bring to justice the person who had made such a forecast dishonestly.

It would seem to be quite understandable, in those circumstances, if Parliament, intending to do something about misleading, false and deceptive forecasts, took the view that, as a practical matter, it ought to go a step further than in the case of false statements and dishonest concealment of facts, and, besides striking at the dishonest prophet, do something to ensure that even the honest ones should take due care to see that their forecasts were not misleading, false and deceptive, and if, although honest, they were reckless, they should be liable to a penalty. There is nothing in this so repugnant to

natural justice that I ought to limit the meaning of words which Parliament has used. It has given the courts, after all, ample latitude in the matter of punishment, enabling them to discriminate properly between moral turpitude and mere recklessness. It is not without interest to observe that Lord Herschell in DERRY *v.* PEEK (*supra*) foreshadowed that Parliament might one day provide against negligence which was merely a breach of moral duty. Such weight as attaches to that which I have just said is not diminished because this part of section 12 (1) deals also with statements and promises. With those considerations in mind and remembering all that has been urged on behalf of the defendants, I am unable to accede to the argument that the word " reckless " in section 12 (1) should receive a restricted meaning connoting only such recklessness as is dishonest. In my opinion, it must be left to bear its full meaning, and be construed, therefore, as covering the case where there is a high degree of negligence without dishonesty. I thus reach independently the same conclusion as Humphreys J. did in HINDES *v.* MUSGRAVE (1951) (unrep.) and I hold count 3 of the indictment to be good.

[The trial proceeded and the defendants were convicted on counts 1 and 2, the jury being discharged from giving a verdict on count 3.]

Solicitors: Solicitor to the Board of Trade, for the Crown; E. P. Rugg & Co., for the defendant Bates; Claude Hornby & Co., for the defendant Russell.

NOTE.—An appeal by Russell against conviction was heard by the court—The Lord Chief Justice, Mr. Justice Hilbery and Mr. Justice Hallett—on December 17, 1952. In giving the judgment of the court, the Lord Chief Justice said: " I see no reason why the court should not say that they agree with the view of the learned judge on the statute. But, no doubt, that matter will arise again substantially in the future, and can then be dealt with."

BEFORE

MR. JUSTICE HILBERY, MR. JUSTICE STREATFEILD AND MR. JUSTICE McNAIR

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False Pretences—Sale of Motor-car—Representation that Defendant Was Owner and Car Unencumbered—Previous Documents Purporting to Record Sale of Car and Hiring Back to Defendant—Defence that Transaction Was in Reality Loan on Security of Car—Direction to Jury.

The appellant was charged with obtaining from C. a Standard motor-car No. DYW 29 " by falsely pretending that he was the owner of a Standard motor-car No. FXF 372, that the said car was free from all encumbrances, that there was no money owing upon the said car, and that he was free to deal with the said car." The appellant, who had previously purchased the car No. FXF 372 had, prior to the transaction with C., signed a number of documents which purported to effect a sale by him of that car to G.W.M. and a hiring back to him of the car by a finance company. The document which purported to be the hire purchase agreement had not been registered as a bill of sale under the Bills of Sale Act, 1878. The appellant contended that the documents were not genuine documents and that the transaction was in reality one under which he was obtaining a loan on the security of the car. The jury were directed that the issue for them was whether the aforementioned transaction was a loan on the security of the car or a genuine sale with a hiring back to the defendant, but that, when they were considering the representation that the car was free from encumbrances even if the transaction were to be treated as a loan, the documents, could be regarded as creating a charge on the car.

Held, following POLSKY *v.* S. & A. SERVICES; S. & A. SERVICES *v.* POLSKY [1951] 1 All E.R. 185, that in such circumstances the court could go behind the form and look at the reality of the transaction; and that if the transaction were found to be only a colourable sale and hiring back to the appellant and in reality a loan on the security of the car, the documents which purported to effect the loan were void as not having been registered under the Bills of Sale Act, 1878, and

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the falsity of the representation had not been established; and that, in view of the misdirection with regard to the effect of the documents, the conviction must be quashed.

Appeal against conviction.

The appellant was convicted at Middlesex Sessions on July 10, 1952, of obtaining a motor-car by false pretences and was sentenced by the Deputy Chairman to three years' imprisonment.

In November, 1947, the appellant had produced a Standard motor-car registered No. FXF 372. In January, 1948, being financially embarrassed, he signed a number of documents which purported to effect a sale of that car by him to Great Western Motors and a hiring back of the car to him by the Central Wagon & Finance Co. Under the document which was in form the hire-purchase agreement he obtained the use and possession of the car. That document was not registered as a bill of sale under the Bills of Sale Act, 1878. On February 3, 1948, he obtained from one George Walter Clarke a Standard motor-car registered No. DYW 29 in exchange for the car registered No. FXF 372. He represented to Clarke that he was the owner of the last-mentioned car, that it was free from encumbrances and had no money owing on it. The false pretence laid in the indictment was that " he was the owner of a Standard motor-car No. FXF 372, that the said car was free from all encumbrances, that there was no money owing upon the said car, and that he was free to deal with the said car." The appellant's defence was that the documents were not genuine, but only colourable and that the real transaction was one of loan on the security of the car. The material portions of the summing-up are set out in the judgment.

Mark Smith, for the appellant:

The issue for the jury was whether the transaction was a sale by the appellant with a hiring back to him by the finance company or a loan on the security of the car. They were entitled to look at the real transaction and not merely to that disclosed by the documents: POLSKY *v.* S. & A. SERVICES; S. &

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A. SERVICES *v.* POLSKY [1951] 1 All E.R. 185. If the transaction was one of loan, inasmuch as there was no registration of the documents under the Bills of Sale Act, 1878, the documents were of no effect and there was no encumbrance on the car, and accordingly the representations by the appellant could not amount to a false pretence. The summing-up misdirected the jury on this point; it correctly told the jury what the issue was, but wrongly explained the effect of the documents.

J. Hutchinson, for the Crown:

The jury were properly directed on what the issue for them was and inasmuch as the appellant must have known of the existence of the agreement, he must have believed that there was an encumbrance on the car, and, when he said that the car was not encumbered, the false pretence was established on any view of the transaction.

HILBERY J.: The appellant was charged on an indictment which contained one count only. He was charged that on February 3, 1948, with intent to defraud, he "obtained from George Walter Clarke a Standard motor-car No. DYW 29 by falsely pretending that he was the owner of a Standard motor-car No. FXF 372, that the said car was free from all encumbrances, that there was no money owing upon the said car, and that he was free to deal with the said car."

The short relevant facts are that in November, 1947, he had purchased and paid for a Standard motor-car No. FXF 372. The purchase price was something a little over £300. By February, 1948, the appellant was financially embarrassed, overdrawn at his bank and in want of money. He saw an advertisement by a firm called G.W.M. Finance of Bishopsbridge Road, Paddington, which stated, "We will purchase your car or commercial vehicle for cash and arrange re-purchase over one to two years, easy repayments." In response to that advertisement he signed a number of documents which, it was said by the prosecution, effected a sale by him to Great Western Motors and a hiring by a firm called Central Wagon & Finance Co. of this car back to him, though there was no document of

sale and purchase as between Great Western Motors and the Central Wagon & Finance Co.

After raising a sum of money on the car from the Central Wagon & Finance Co. and signing what was in form a hire-purchase agreement from the company to him of what had immediately before been his own car, he had the use and possession of that car. There was no evidence that that document which purported to be a hire-purchase agreement, under which the appellant was expressed to be the hirer and the Central Wagon & Finance Co. were expressed to be the owners, was ever registered as a bill of sale under the Bills of Sale Act. After the time during which it might have been registered under that Act had passed, in February, 1948, the appellant saw an advertisement by a Mr. Clarke expressing his willingness to exchange his Standard 12 horse power car for a car of smaller horse power. The Standard motor-car No. FXF 372 was in fact, I think, of nine horse power. He thereupon went to Mr. Clarke and effected an exchange of the Standard car No. FXF 372 for Mr. Clarke's car. The evidence of Mr. Clarke was that that exchange was brought about by, amongst other things, statements or representations by conduct on the part of the appellant that he was the owner of the Standard motor-car which he was offering to exchange, and that it was free from encumbrances and had no money owing upon it.

To establish the falsity of that statement or representation the prosecution relied on the production of the documents which had passed between the Great Western Motors and the appellant and the appellant and the Central Wagon & Finance Co. and the hire-purchase agreement. Their case was that those documents in fact made the car the property of the Central Wagon & Finance Co., Ltd., and made them the hirers back of the car to the appellant and that that same hire-purchase agreement showed that it was false when the appellant said that the car was his property, inasmuch as the appellant was not free to deal with the car because of that agreement. The answer by the appellant, which may be disingenuous, was this: "In fact those documents were not genuine documents

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under which I in truth sold my car and had it hired back to me. I was raising money on my car by that means and the way in which it was done was by my entering into those documents and signing them, but in truth the transaction was one under which I was obtaining a loan on the security of my motor-car."

Counsel for the appellant cited before the court a case decided by the Lord Chief Justice, POLSKY *v.* S. & A. SERVICES; S. & A. SERVICES *v.* POLSKY [1951] 1 All E.R. 185, which was affirmed subsequently by the Court of Appeal, whereby it was decided that it is always open to the court to go behind the form of the transaction and to look at the reality, and if such a transaction as that which had come under consideration in this case was found in fact to be only a colourable transaction of sale and fresh hiring, whereas in truth and in fact it was a transaction of loan on the security of the car, then the documents which purported to effect that hiring were void if not registered within the time laid down by the Bills of Sale Act.

That being the defence to the evidence which the prosecution was adducing to establish the falsity of the representation made by the appellant, it became essential that the jury should determine the question of fact—whether the transaction into which the appellant had entered with the Central Wagon & Finance Co. and Great Western Motors was in truth a transaction of loan on the security of the car or whether it was a genuine sale with a hiring back to him of the car. If the jury answered that it was a genuine sale by him of his car and a hiring back to him, then of course the falsity of his pretence that it was his car was established, which was the first essential for the success of the prosecution. If, on the other hand, the jury, under proper direction, came to the conclusion of fact that the transaction was one merely of loan on the security of the chattel, namely, the motor-car, as the documents had never been registered, then the right answer was that the falsity of the pretence relied upon was not established by the only evidence adduced to establish its falsity.

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It has been argued that, because a document was in existence purporting to represent as between the parties an agreement of hire and purchase, the false pretence was established when the appellant said that it was his car and not encumbered, because he must have believed that and known that there was in existence this agreement. It is to be observed that the false pretence which was alleged was not that he falsely pretended that there was not in existence any hire-purchase agreement in respect of the car; and that in fact he made no such representation was clearly established in the cross-examination of Mr. Clarke when before the magistrates, as appears from the depositions.

In those circumstances, if the direction given to the jury was a clear direction that, in the event of their finding that this was in truth a loan transaction on the security of the car and not a genuine sale with a hiring back, the right verdict would be Not Guilty, the verdict of Guilty by the jury would be tantamount to a finding by them that the transaction was not one merely of loan but was in fact a genuine transaction of sale and hiring back to the man who had, prior to that sale, been the owner of the car. Unfortunately, whereas the issue that the jury had to try was correctly put in the summing-up, there was matter later on in the summing-up which, in our opinion, prevents us from taking that view of the verdict and vitiates the summing-up, having regard to the exact terms of the false pretences alleged in the indictment. The learned Deputy Chairman said this: "It is a question of fact: what was the true nature of the transaction?"—that was right. Then he said: "I will discuss the evidence about it with you a little later; but you will have to consider whether Deller really did sell his car and take it back on hire-purchase, or whether it was, in truth, borrowing money on the security of the car. I do not know. You, probably, are in as good a position to form a view upon the evidence on that as anybody; at any rate, it is your duty to do so." There is no criticism to be made of that passage. Then the learned Deputy Chairman went on: "But I want just to see what is the effect on the

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charge which you have to determine of the two possible views about it. It seems to me that that is, again, a shortish point. If, in truth, you think that Deller sold his car and took it back on hire-purchase two days before the other transaction, then you will have to consider whether it was not a false pretence to say that he was the owner of the car, after having done that, or that he was free to deal with it, if that was in any way represented." Again, so far, there is little criticism to be offered. Then the learned Deputy Chairman went on: "But, you know, suppose you took the view that this was a loan, the difference that that makes, as the defence put to you, is: if it was merely a loan, Deller was still the owner of the car, and therefore it would not be a false pretence, as it is said, to say he was the owner of it; it was, in fact, true." Had the learned Deputy Chairman gone on there to say: "Therefore, if you find that it was merely a loan, and that therefore the accused man remained the owner of the car because this was void in law, you will acquit," all would have been well; but, unfortunately, the learned Deputy Chairman went on: "But you then go on to consider the other things:"—and this I think clearly relates to the other alleged false representations—"that the car was free from all encumbrances. That must mean that there was no encumbrance upon it. I do not think it is right to limit the consideration of that expression to a charge which can be enforced in law. A charge is a charge. There was no money owing on it. There you have had the advantage of having heard Deller's account of it. He was very much pressed, you know, by Mr. Hutchinson: was the car pledged as a security for a loan? He began by saying: 'I did not think the car was anything to do with it.' But ultimately, he said, according to my note of the evidence: 'The firm looked on it as a security for the loan'." A little later on in his summing-up, the learned Deputy Chairman said: "But you may come to the conclusion that, in fact, it was a loan, and then you will have to consider what do these documents mean, on that view? Were they the documents by which this car was made security for that loan?" Of course,

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once the jury came to the conclusion that in fact the transaction was one of loan and not of sale of the car, but loan on the attempted security of the car, the documents as a matter of law were void documents, and that the learned Deputy Chairman must have known. But in one and the same breath he was asking the jury to say, if they thought it was a loan, to look upon the documents as being the security for that loan and saying to the jury that, whatever they thought about the strict ownership of the car, when they came to the representation that it was unencumbered, here were these documents which were a charge upon the car. In truth, if they came to the conclusion that the transaction was a loan, as a matter of law the documents were void; they were no more than pieces of paper. The charge to the jury ought to have been: if they came to the conclusion that the documents represented only a transaction of loan on the security of the car, then the documents were all void and of no effect, and the falsity of every one of the alleged representations was not proved because, it may be quite accidentally and, strange as it may sound, dishonestly, the appellant had told the truth. In the circumstances, it seems to us to be quite clear that the jury may well have thought that, although these were documents to cloak a loan transaction and to give a loan transaction the colour of a sale and a hiring back, yet none the less they were a charge on the car, and to say it was unencumbered became a false pretence. Having regard, therefore, to the indictment and the direction in the summing-up, we are of opinion that this conviction must be quashed.

Conviction quashed.

Solicitors: Bryden & Williams, for the appellant; The Solicitor, Metropolitan Police, for the Crown.

[COURTS-MARTIAL APPEAL COURT]

BEFORE

MR. JUSTICE HILBERY, MR. JUSTICE STREATFEILD AND MR. JUSTICE McNAIR

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DENNIS TUCKER

Ground of Appeal—Finding Unreasonable and One which Cannot be Supported Having Regard to the Evidence—Duty of Court to Investigate Whole of the Evidence—Courts-Martial Appeals Act, 1951 (14 & 15 *Geo.* 6, *c.* 46), *s.* 5.

Fraudulent Misapplication—Burden of Proof—Army Act, 1881 (44 & 45 *Vict. c.* 58), *s.* 17.

An appeal to the Courts-Martial Appeal Court is not a rehearing and the court will not try a case over again; but where the substantial ground of appeal is that the finding was unreasonable and one which cannot be supported having regard to the evidence, the court will investigate the whole of the evidence which was before the court-martial.

Criticism by the court of note 7 (*a*) to s. 17 of the Army Act, 1881, at p. 223 of the *Manual of Military Law*, Part I, 1951, dealing with the burden of proof on a charge of fraudulent misapplication.

Appeal against conviction.

The appellant, a sergeant of the Royal Army Service Corps, was convicted by a district court-martial at Nairobi of fraudulently misapplying service property, that is to say, money, when concerned in the use thereof, contrary to section 17 of the Army Act. The charge alleged that " on April 1, 1952, when as caterer of the warrant officers' and sergeants' mess, Buller Camp, he was concerned in the case of cash takings in respect of the sale of bar stock in the said mess, service property, [he] fraudulently misapplied S13,000 East African, part of the said cash takings, to the value of £650." He was

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sentenced to be reduced to the ranks and to undergo one year's detention.

The following statement of facts is taken, in substance, from the judgment: The appellant was a sergeant of the Royal Army Service Corps, and was appointed mess caterer for the sergeants' mess at Buller Camp, Nairobi, in October, 1951. His duties were to stand behind the bar, to sell stock, to receive money and hand that money over at the end of each day to the duty officer. Under the Queen's Regulations there was a mess treasurer, whose duties included a duty to maintain the wet and dry stock books. When the mess treasurer did his duty, the evidence was that it was done daily during the first period from October, 1951, when the appellant became mess caterer, to December 31, 1951. Again there was evidence that this course had been followed by the man who was then the mess treasurer. In December, notwithstanding that this course was followed, the appellant reported that there was, according to the books, a deficiency of some £70. A free audit was held, and that deficiency was confirmed. No action was taken in respect of that deficiency; no one appears to have suggested that it indicated any dishonest misapplication of the funds by the appellant as mess caterer.

On January 1 and from January 1 to March 31, 1952, a Captain Jewson was the officer in charge of the sergeants' mess accounts. A new treasurer was appointed, one Sergeant Strange, as at January 1, and from the 1st to the 8th January the new treasurer maintained the wet and dry stock books. Thereafter, he never entered up either the wet or the dry stock book or did anything at all to maintain them. His explanation given to the court-martial was that on January 8 he applied to be relieved and assumed thereafter that he was discharged from a further performance of his duties.

The appellant carried on as mess caterer for the rest of the quarter, handing over daily what he alleged and asserted in his evidence were the daily takings less the float of S150, which was retained, and during this time the appellant reported to the mess president that the treasurer was not keeping up the

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books. He himself tried to keep some check on stocks and on sales by making pencil jottings on pieces of paper, and sometimes putting pencil entries in the stock books. He complained more than once to Captain Jewson and to the president of the mess committee that he was getting no help and was quite unable to keep up the books by himself. Captain Jewson received the cash takings from the duty officer to whom the appellant, as was his duty, handed them. He thus received the cash takings and from the funds of the mess he paid the bills. The goods, the stock for the mess and for the bar where the appellant was the barman, were provided from the NAAFI. Captain Jewson did not check the wet or dry stock books, and he said in his evidence that he did not notice that the amounts which he had to pay out to NAAFI—that is, for the stocks supplied to this bar—were out of proportion to the amounts which he was receiving daily.

On April 1, 1952, Captain Jewson had to hand over his duties to another officer, Captain Owen, and for this purpose he called a meeting consisting of the president of the mess committee, the treasurer, the appellant as caterer and Captain Owen. The appellant failed to attend and was later found wandering outside the camp in Nairobi, and said that he was very worried over certain personal troubles connected with his family, but he returned to camp when asked to do so and produced the stock books.

There were two stock books, one relating to beer and other liquors, and the other one, the dry stock book, to cigarettes and other dry goods. Captain Jewson found that the beer stock book had not been made up for seven or eight days and the other book had not been made up for four or five weeks. Captain Jewson, in the absence of the appellant, took the value of the stock in hand by obtaining the prices from the African mess boy, and he made up the total into a sum of shillings. Then Captain Jewson ordered Quartermaster-Sergeant Davies and the appellant to endeavour to get out an account, and eventually these two working together reported that there remained unaccounted for 12,000 odd shillings. That supposed

deficiency was arrived at by Davies and the appellant basing themselves first of all on the figures for the value of the stock in hand which Captain Jewson had obtained by inquiry of the African mess boy. In his evidence explaining how he arrived at that result, Davies made no mention of the stock figure which was taken as the value of the stock in hand at the beginning of the period, that is, at January 1.

Captain Jewson then caused an account to be taken by Sergeant-Major Swift of the Royal Army Pay Corps. Sergeant-Major Swift, notwithstanding that he held that rank in the Royal Army Pay Corps, when he gave his evidence, produced no original figures taken out by him, and no original calculations made by him, and he gave no evidence of what selling prices he worked on, but he made out finally a deficiency of S13,221 95 cents. Upon that, the appellant was interviewed by Captain Jackson, who told him that he had reason to believe that he had inserted false figures in the stock book, and the appellant said in reply: "That is quite true, Sir, as the books were never made up by the treasurer." He explained that by saying that it was not possible for him to enter them each day, and sometimes he had to enter up as best he could six or seven days at a time. He made a statement, the substance of which on this material matter was the same.

The other evidence was evidence given by the African bar boy who helped the appellant to sell the beer, and so on, in the mess. His evidence was, and the evidence of the appellant was, that when the appellant had an evening off the bar boy would ordinarily be left in charge. There were, however, according to the evidence, other occasions when the appellant was not on duty in the bar but was relieved by other sergeants; and in addition there was evidence that he was sometimes helped actually in the bar on busy occasions by other sergeants. The stock was said to be kept in a locked store. There was no till in the bar. A drawer or box, which had no lock or key, was the receptacle used for the takings.

The appellant, giving evidence, said that when he took

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over the duties of mess caterer, no one explained to him what those duties were. He knew that the treasurer ought to check the books daily and fill in in ink the figures which he himself had put in in pencil, but the treasurer did this only three times early in January and did not do it at all after January 9. He said, and it was not challenged, that he told the president of the mess committee and Captain Jewson about this. Towards the end of March, he said, he reported to the president and to Captain Jewson that the accounts were in a mess, but no action was taken till April 1, when he was due to hand over to another caterer.

Charles Lawson, for the appellant.
R. A. L. Hillard, for the Crown.

HILBERY J.: The appellant in this case was convicted by a district court-martial held at Nairobi of fraudulently misapplying service property, that is to say, money, when concerned in the care thereof, contrary to section 17 of the Army Act, 1881. He was at the time a sergeant. He was sentenced to be reduced to the ranks and to undergo one year's detention. He now appeals by leave granted by the court.

The charge against him, on which he was found guilty, was that at Nairobi "on April 1, 1952, when as caterer of the warrant officers' and sergeants' mess, Buller Camp, he was concerned in the case of cash takings in respect of the sale of bar stock of the said mess, service property, fraudulently misapplied S13,000 East African, part of the said cash takings, to the value of £650." The charge was based on an allegation of a general deficiency in money for which the accused was accountable at April 1, 1952. That alleged general deficiency in money is now admitted to be a general deficiency ascertained in such circumstances and in such a way that it might represent either money or goods, or partly money and partly goods.

The appellant puts forward as grounds of his appeal—and I think I can epitomise them—first, that the conviction, as he puts it with some vehemence, was a travesty of justice,

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meaning that there was no evidence to substantiate the charge that was made. Further, he says that it was not proper to charge him with a general deficiency in the circumstances, and that he was in truth a person who had to account for his cash receipts every day, and was accountable every day, and that, in those circumstances, it was improper at the conclusion of a quarter when he was to hand over his duties to treat that day when he was to hand over as his accounting day for the whole quarter; and he alleged that as at that date it was a deficiency which might have arisen at any period in or during the whole quarter.

[His Lordship then stated the facts as set out above, and continued:] Taking the view which we do take of the whole of the evidence, it is not necessary for us to decide whether in this case it was proper to base this charge on an alleged general deficiency or to decide what was, in the circumstances, the proper accounting period. Nor, I think, need we decide the point that also arose on the argument of the appellant, that is, the question of what was the day on which it was the duty of the appellant to hand over moneys received by him as mess caterer, the point being taken that he had to do it daily and did it daily.

Section 5 of the Courts-Martial Appeals Act, 1951, provides as follows: "Subject to the provisions of the next following section, on an appeal under this Part of this Act the court shall allow the appeal if they think that the finding of the court-martial is unreasonable or cannot be supported having regard to the evidence or involves a wrong decision of a question of law or that, on any ground, there was a miscarriage of justice, and in any other case shall dismiss the appeal." It is right for us to emphasise that an appeal to this court is not a rehearing. We do not try the case over again but when, as here, it is the ground, perhaps the principal ground, of the appeal that this finding in question involved a wrong decision, a decision which was unreasonable and cannot be supported having regard to the evidence, it becomes essential, of course, for this court to investigate the whole of the evidence that was

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before the tribunal in order that this court may ascertain whether the evidence did support and can be regarded as supporting the finding of the court-martial, and whether that finding was not supported, that is to say, established by the evidence, or was unreasonable. It is for those reasons and because the assistance of the court is invoked under the terms of section 5 that we have in this case gone through the whole of the evidence and investigated it.

In our view, the finding of the court-martial, that is, of the guilt of the appellant of a misapplication of this very large sum of money, cannot be supported having regard to the evidence and must be held to be an unreasonable finding. The appellant was proved to be a man of perfectly good character, reliable but requiring guidance because not very intelligent. It is to be observed that notwithstanding that there was an apparent deficiency of about £70 in the accounting for the three months to December 31, 1951, there was no suggestion that it pointed to dishonest misapplication of that money by the appellant. Indeed, the appellant was thereafter continued in his appointment as mess caterer for the period from January 1, 1952, to March 31, 1952. There was no evidence that the appellant in the period in question was indulging in any unusual expenditure or was under any financial stress or was gambling. His pay account was £12 odd in credit and he had no Post Office or other banking account. There was no evidence that he had ever used any money taken in the bar by him or disposed of any of the stock otherwise than by sale in the bar.

It was argued that the proof of a deficiency ascertained in the way which I have indicated, coupled with the absence of any explanation by the appellant, amounted to proof of misapplication within the meaning of section 17 of the Army Act, upon which the charge was framed. When it is borne in mind that it was conceded that this deficiency so ascertained might represent a deficiency of money or goods or both, the fallacy in this argument is apparent. To misapply is to apply wrongly. There was no evidence that the appellant applied

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the alleged sum or any sum for a wrong purpose. Still less was there any evidence that he had done so dishonestly. Accordingly, this court, exercising its power under section 5, which I have quoted, allows the appeal and quashes the conviction.

There is one other matter which we feel it right to mention. There is a note numbered 7 (*a*) to section 17 of the Army Act at p. 223 of the *Manual of Military Law*, Part I, 1951, particularly dealing with the offence of fraudulent misapplication, in which it is said: "It is sufficient to allege in the particulars of the charge that the property was 'fraudulently misapplied' unlike the civil offence where the particulars must allege to whose benefit the property was converted." Then the note goes on in these terms: "If no evidence is forthcoming as to the particular mode of misapplication, the court may, in the absence of explanation from the accused, infer that the property was misapplied from the fact of its not having been properly applied and if, in the circumstances, they think it was dishonestly misapplied they can convict the accused."

The Judge Advocate in this case in summing up stated the case for the prosecution in the following terms: "What the prosecution says here, you know, is that there was this deficiency which is completely unexplained by the accused, and that he had the money and the opportunities of disposing of it; that his conduct throughout this time was such that you must be irresistibly drawn to the conclusion that he dishonestly took that money." The Judge Advocate, no doubt having this note in mind, failed to warn the court that they were not entitled to draw the inference of guilt from the absence of innocent explanation. In the circumstances of this particular case that was an unfortunate omission. This was a case where this deficiency might represent a deficiency of goods or money or both. In the way in which the accounts were taken it was obvious that this supposed deficiency might not be a real deficiency at all, and in those circumstances, if that was the fact, no possible explanation of it could be found or given by

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the accused person. The danger of this note is that it almost lends colour to the suggestion that the burden of proof shifts on to an accused man where, by some process of accounting, there appears to be a deficiency. The occasions on which an accused man is ever called upon to give an innocent explanation about some matter with which he stands charged are extremely rare in our criminal law, and we call attention to this note because we think that as it stands it is unfortunately worded and should be the subject of revision.

Conviction quashed.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HILBERY AND MR. JUSTICE PARKER

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HENRY STEPHEN YOUNG
RONALD WILLIAM SPIERS

Receiving Stolen Goods—Proof of Larceny.

The decision in COHEN *v.* MARCH [1951] 2 T.L.R. 402 depended entirely on its own facts, and laid down no principle of law.

Appeals against conviction.

The appellants were convicted at West Kent Quarter Sessions on October 5, 1952, of receiving stolen metal and were sentenced by the Deputy-Chairman to nine months' imprisonment and three years' corrective training respectively.

Dorothy Dix for the appellants:

There was no evidence that the property referred to in counts 1 and 2 was stolen. It was not identified, and the appellant Young gave an explanation of where he found it.

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Reliance is placed on the decision of this court in COHEN *v.* MARCH [1951] 2 T.L.R. 402.

R. I. S. Bax, for the Crown, was not called on.

THE LORD CHIEF JUSTICE: The appellants were convicted at West Kent Quarter Sessions of receiving stolen metal. There were four counts in the indictment, two counts of larceny and two of receiving against each appellant. The first two counts related to 143 lb. of brass and phosphor bronze; the second two to lead hammers and a brass bearing bush, which were identified as the property of a particular firm. No point arises on the last two counts; on the first two it is suggested that there is no evidence against the appellants, because the property was not identified.

The police went to the premises of the appellant Spiers and said that they were looking for metal, and he denied being in possession of any. They found metal hidden away and Spiers then said that he had paid the appellant Young £5 for it the day before, which was very likely true. When Young was interviewed, he said that he had picked the metal from a dump. At the trial he went into the box and swore that it had not been stolen.

It has been laid down over and over again that the circumstances of the case may justify a jury in coming to the conclusion that there has been a larceny or a receiving of the property. In the present case the metal was new, untarnished, and recently milled, and there was a considerable quantity of it. In those circumstances the jury found that it was stolen metal. It is contended that we ought to quash the conviction on the ground that there was no evidence of larceny, and reliance was placed on COHEN *v.* MARCH [1951] 2 T.L.R. 402, which was a case in which there had been a charge in respect of some stolen razor blades and the court came to the conclusion that some untruths which had been told to the police when they first interviewed the prisoner did not justify an inference that the goods were stolen. I expressly said, in giving the judgment of the court in that case (at p. 404): "I suppose

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there might be a case—circumstances differ so infinitely—in which a person makes a statement on which a jury would be justified in finding that he did not know that the goods were stolen." The court was not there intending to lay down any principle of law. They were merely dealing with the particular facts of the case, and they came to the conclusion that the evidence did not justify the jury in finding that the goods were stolen.

In the present case the jury found that the goods were stolen, and, in the opinion of the court, there was evidence on which they could do so. There was a very careful summing-up by the deputy-chairman, and the jury having seen the metal and heard the appellant Young tell a story on oath which they rejected, came to the conclusion, which is not surprising, that he had stolen the property. It is one thing to make some answer to a policeman; it is quite another thing to give evidence on oath at the trial; and if the jury found that they disbelieved Young on oath, they might think that he had a good reason for telling a perjured story, and that they ought to find him guilty of stealing. There was ample evidence from the circumstances in which the goods were found to justify the conviction of Spiers of receiving them knowing them to have been stolen. The same points have been made on behalf of Young as were made on behalf of Spiers, and, in the opinion of the court, there is no ground for interfering with his conviction. We are not laying down any rule of law in this case.

Appeals dismissed.

Solicitor: The Solicitor, Metropolitan Police, for the Crown.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HILBERY AND MR. JUSTICE HALLETT

RAYMOND RICHARD ROGERS

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Sentence—Corrective Training—Preventive Detention—Order to Report After Sentence Served—Convictions on "Previous Occasions" Necessary to Qualify—Convictions Each at a Separate Court Required—Period of Work Since Last Conviction—Supervision Order Omitted Per Incuriam—Criminal Justice Act, 1948 (11 & 12 *Geo.* 6, *c.* 58), *s.* 21 (1) (*b*), (2) (*b*), *s.* 22 (1) (*a*), *s.* 23.

Where the Criminal Justice Act, 1948, requires convictions on a number of "previous occasions" as a necessary qualification for a sentence of corrective training under section 21 (1) (*b*), or of preventive detention under section 21 (2) (*b*), or of an order to report after the serving of a sentence of imprisonment under section 22 (1) (*a*), each conviction must be a conviction at a separate court. Where there has been more than one conviction at the same assizes or quarter sessions, or at the same sitting of a court of summary jurisdiction, it will be reckoned as one conviction only for the purpose of the aforementioned subsections.

The mere fact that a prisoner has made some effort to get work or has had a period of work since his last conviction does not of itself disqualify him from sentence of preventive detention.

Where *per incuriam* a court has omitted to make an order under s. 22 of the Criminal Justice Act, 1948, the Court of Criminal Appeal, on application for leave to appeal or appeal against either conviction or sentence, may make such an order. The governor of the gaol may call the attention of the court to the omission.

Appeal against sentence.

The appellant was convicted at Dorset Quarter Sessions on October 1, 1952, of a number of offences of housebreaking and

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larceny, and was sentenced by the Deputy-Chairman to terms of imprisonment amounting to eight years in the aggregate.

Notices had been served under section 23 of the Criminal Justice Act, 1948, with a view to qualifying the appellant for preventive detention. Of the three convictions set out therein one had taken place at Wiltshire Quarter Sessions and the other two at Dorset Quarter Sessions on the same day on two counts of the same indictment. The Deputy-Chairman took the view that there had not been convictions of the appellant on indictment " on at least three previous occasions " within the meaning of section 21 (2) (*b*) of the Criminal Justice Act, 1948, and that he was not, therefore, entitled to pass a sentence of preventive detention. By an oversight he omitted to make an order under section 22 of the Criminal Justice Act, 1948.

Henry Elam for the appellant.
J. H. Buzzard for the Crown.

THE LORD CHIEF JUSTICE: The appellant, Raymond Richard Rogers, was convicted at Dorset Quarter Sessions of housebreaking and larceny and, being a man with a very bad record, and it being shown that he was really incorrigible because after he had been put on probation he had the very same day committed the offences for which he was before the quarter sessions, he was, therefore, apparently a very fit person for preventive detention. The learned Deputy-Chairman saw a difficulty because the three previous convictions, notice of which was served upon him, were one, a conviction at Wiltshire Quarter Sessions, and the other two were convictions at the same Dorset Sessions on the same day. The learned Deputy-Chairman therefore said that he was not satisfied that the court had jurisdiction to pass a sentence of preventive detention because the statute provides that the offender must have been convicted on indictment on at least three previous occasions. There had not been three previous convictions on indictment unless the two convictions that took place at Dorset

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Sessions on the same day on two counts of the same indictment could be regarded as convictions on two separate occasions.

The court gave leave to appeal in this case because, though they had no doubt that the sentence which the sessions passed, a sentence of eight years in the aggregate, was in the circumstances right in point of time, it was obvious that a point of great importance was raised because similar circumstances might easily arise again at any assizes or quarter sessions. We therefore gave leave to appeal in order that we could consider what is the meaning of the words in section 21 (2) (*b*) of the Criminal Justice Act, 1948, "at least three previous occasions." Do they mean at least three separate appearances before a court, or do they mean three different convictions of which separate records of conviction can be drawn up? In other words, if a man has appeared before, let us say, the Central Criminal Court in the January Sessions, and has there pleaded guilty either to an indictment containing three counts or to three separate indictments all at the same sessions, has he, if he commits an offence subsequently, been convicted on three previous occasions, so that he can be sent to preventive detention?

The statute in fact uses the same expression in two other places, once in another place in section 21 (in subsection (1) (*b*)) and once in section 22 (1). The first use of the words in section 21 (1) (*b*) deals with corrective training, and it is there provided, among other things, that an offender must have been convicted on "at least two previous occasions . . . of offences punishable on indictment" with a sentence of two years' imprisonment or more, but he need not have been convicted on indictment. Section 22 provides: "(1) Where a person is convicted on indictment of an offence punishable with imprisonment for a term of two years or more and that person (*a*) has been convicted on at least two previous occasions of offences for which he was sentenced to Borstal training or imprisonment," and so on, an order under that section shall be made requiring him to report when he comes out of prison. There are, therefore, at least three places in the Act where the words

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" previous occasions " are used, and in the opinion of the court the same interpretation must be put upon those words where they appear in section 21 (1) which relates to corrective training, and in section 22 which deals with the requirement to report, as the court puts on them in regard to section 21 (2), the subsection dealing with preventive detention. It is quite obvious that where an expression like " previous occasions " is used twice in one section and once in the following section, the same construction must be put upon it in each case.

We have received great assistance from counsel in this case, and it is a short point, but it does not follow that it is an easy point, and, in some respects, it is not. The first thing is to consider what are the provisions of this Act. So far as preventive detention is concerned, we have to remember that there was a previous Act, the Prevention of Crimes Act, 1908, which provided for preventive detention of persons who had been found by a jury to be habitual criminals. Those of us who practised in days gone by remember how difficult it was to steer through the mass of cases which dealt with habitual criminals—to find what was necessary to be proved and what direction had to be given to a jury, and so forth. Therefore, sentences of preventive detention under that Act were very few. Parliament has altered the law and it now enables the court, on proof of a certain number of convictions to show that a person is qualified for preventive detention, to pass that sentence. Although we have said—and I emphasise this because I think it has been somewhat misunderstood—in a case quite early in the history of this Act that preventive detention was meant for people who were more or less in the class of habitual criminals under the old Act, we certainly did not mean to say that, merely because a man had made some effort to get work or had had some period of work after his last conviction, that fact alone disqualified him from being sentenced to preventive detention, although it might have disqualified him from being an habitual criminal under the old Act. The Criminal Justice Act was intended to deal with

people who showed by their conduct that previous sentences had had no effect upon them and that, therefore, they were fit subjects for long detention for the protection of the public. The protection of the public by keeping such persons in detention for a long period is the main object here, not the reformation nor the punishment of the criminal. If a man is sentenced at assizes for two or three offences, the court always aggregates the sentences, and says to the prisoner either "you will be sentenced to five years on count 1 and three years on count 2, the sentences to run concurrently, in which case you will serve five years," or if it does not think that is sufficient "you will be sentenced to five years on the first count and three years on the second count, the sentences to run consecutively, which means you will serve eight years." The sentence in the one case is five years and in the other case eight years. Is it, therefore, to be said in sentencing a prisoner to five years and three years a court is sentencing him on two separate occasions, whereas if it is sentencing him to five years alone it is sentencing him only on one occasion? The principle is that if the prisoner shows that the sentences he has received at a particular court and also at two subsequent courts do not deter him from committing crime, then he is to be liable to preventive detention.

Therefore, the court is of opinion that we must construe these words "on at least three previous occasions," as meaning three occasions, each at a separate court. That is to say, two sentences passed on the same prisoner at the same sessions or the same assizes will not rank as two separate occasions. Each occasion must be at a separate assize or a separate quarter sessions. I think on the whole that is giving effect to the intention of the Act, because it will then have shown that the three previous appearances in court and the sentences imposed on him on three separate occasions have not done the prisoner any good, and therefore the time has come to try a long sentence.

The only difference with regard to corrective training is that for that sentence summary convictions of offences which

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would be punishable on indictment with imprisonment for two years or more can count. In our opinion, where the conviction relied on is a summary conviction, although the offender may be convicted of three or four summary offences on three separate informations, he will have been convicted only on one occasion if the convictions are at the same court. If he has appeared on separate informations twice in the same month but at courts held at an interval, he will then have been convicted on two occasions. I think that is the only sensible reading. If one construes the word " occasion " as meaning appearance in court, whether at assizes, quarter sessions or petty sessions, that gives a meaning consonant with the spirit and intention of the Act.

For these reasons we think that the learned Deputy-Chairman of Dorset Quarter Sessions was right in holding that the appellant was not eligible for preventive detention, and we see no reason to alter the sentence.

We did mention in giving leave to appeal that the Deputy-Chairman had not said in passing sentence that there would be an order under section 22. That matter has already been considered in this court, and where the court of trial has not said that it refrains from making any order under section 22, and it is found when the matter comes up on appeal that an order has not been made *per incuriam*, we have found no difficulty in saying that the sentence would be altered to that extent. In this case there is no difficulty at all, as the appellant has had leave to appeal against sentence, but we have called attention to the fact that the order can be made even in a case where there has not been an appeal against sentence, because the statute is mandatory and says that the order shall be made unless reasons are given for refraining from making it, and this court will make that order if the matter comes before it on an application.

Further, we desire to say that if, when the governor of the gaol receives a prisoner in custody he finds in a case in which the section would operate that an order has not been made, there is no objection at all to his applying to the clerk of

assize or clerk of the peace to find out whether the order has been omitted *per incuriam*. The governor is entitled to call the court's attention to it. Of course, if the court specifically refrained from making the order that is quite another matter.

Appeal dismissed.

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